UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE SHANE GROUP, INC., BRADLEY A. VENEBERG, SCOTT STEELE, MICHIGAN REGIONAL COUNCIL of CARPENTERS EMPLOYEE BENEFITS FUND, ABATEMENT WORKERS NATIONAL HEALTH and WELFARE FUND, MONROE PLUMBERS and PIPEFITTERS LOCAL 671 WELFARE FUND,

Plaintiffs,

v. CIVIL ACTION NO. 10-14360

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

_____/

MOTION HEARING
BEFORE THE HONORABLE CHIEF JUDGE DENISE PAGE HOOD
United States District Judge
231 Lafayette Boulevard West
Detroit, Michigan
Thursday, November 8, 2018

CITY of PONTIAC, ALYSON OLIVER, GRATIOT COMMUNITY HOSPITAL, METRO HEALTH, MIDMICHIGAN HEALTH, MARQUETTE GENERAL HEALTH SYSTEM, ASCENSION HEALTH, COVENANT HEALTHCARE, SPARROW HOSPITAL, MUNSON MEDICAL CENTER, BOTSFORD HOSPITAL, WILLIAM BEAUMONT HOSPITALS(Royal Oak, Troy, Grosse Pointe), ST. JOHN HOSPITAL & MEDICAL CENTER, GENESYS REGIONAL MEDICAL CENTER, ST. MARY'S of MICHIGAN MEDICAL CENTER, ST. JOSEPH HEALTH SYSTEM, BORGESS MEDICAL CENTER, SOUTHFIELD PROVIDENCE HOSPITAL, PROVIDENCE PARK HOSPITAL NOVI, ST. JOHN HOSPITAL NORTH SHORE CAMPUS, ST. JOHN MACOMB OAKLAND HOSPITAL, ST. JOHN RIVER DISTRICT HOSPITAL EAST CHINA, UNITED STATES OF AMERICA, BRADLEY VENEBERG, THE SHANE GROUP, INC., JEFFREY CONNOLLY, METROPOLITAN HOSPITAL, CHE TRINITY, MICHIGAN HEALTH AND HOSPITAL ASSOCIATION, BRONSON HEALTH CARE GROUP, INC., UNIVERSITY of MICHIGAN HEALTH SYSTEM, PRIME HEALTHCARE SERVICES GARDEN CITY, LLC., McLAREN HEALTH CARE CORPORATION, HEALTH ALLIANCE PLAN of MICHIGAN, CARO COMMUNITY HOSPITAL, HENRY FORD HOSPITAL, HENRY FORD MACOMB CORPORATION, HENRY FORD WEST BLOOMFIELD, HENRY FORD WYANDOTTE HOSPITAL, HENRY FORD HEALTH SYSTEM, NATIONAL SURGICAL HOSPITAL, OAKWOOD HEALTHCARE SYSTEM, OAKWOOD HEALTHCARE, INC., OAKWOOD ANNAPOLIS HOSPITAL, OAKWOOD HERITAGE HOSPITAL, OAKWOOD SOUTHSHORE MEDICAL CENTER, CHARLEVOIX AREA HOSPITAL, DLP MARQUETTE GENERAL HOSPITAL, LLC, THE DOW CHEMICAL COMPANY,

Interested Parties.

SCOTT MANCINELLI, ADAC AUTOMOTIVE, ALMA PRODUCTS COMPANY, BAKER COLLEGE, BORROUGHS CORPORATION, EAGLE ALLOY, INC., FISHER & COMPANY, INC., FOUR WINDS CASINO RESORT, FRANKENMUTH BAVARIAN INN, INC., GEMINI GROUP, INC., GILL-ROY'S HARDWARE/MORGAN PROPERTIES, LLC, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, HI-LEX CORPORATION, HUIZENGA GROUP, KENT COMPANIES, INC., LaBELLE MANAGEMENT INCORPORATED, MASTER AUTOMATIC MACHINE COMPANY INCORPORATED, PETOSKEY PLASTICS, INC., SAF-HOLLAND USA, STAR OF THE WEST MILLING COMPANY, TARUS PRODUCTS, INC., TERRYBERRY COMPANY, LLC, THELAN INC., TRILLIUM STAFFING SOLUTIONS, TRUSS TECHNOLOGIES, WADE TRIM GROUP, INC., MORBARK, INC., CHRISTOPHER ANDREWS, AETNA, INC., FLORACRAFT CORPORATION, MAGNA INTERNATIONAL OF AMERICA, INCORPORATED.

Objectors.

PRIORITY HEALTH INSURANCE COMPANY, SPECTRUM HEALTH SYSTEMS, HOLLAND COMMUNITY HOSPITAL, UNITEDHEALTH GROUP INCORPORATED,

Intervenors.

_____/

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I N D E X

E X H I B I T S

Detroit, Michigan

November 8, 2018

2:01 p.m.

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THE CLERK: Calling civil case number 10-14360, the Shane Group and others versus Blue Cross Blue Shield of Michigan.

Please state your appearances.

MR. MILLER: Powell Miller for the Plaintiff class, your Honor.

THE COURT: Okay. Good afternoon.

MR. SMALL: Good afternoon, your Honor. Daniel Small with Cohn Milstein, for the Plaintiff class.

THE COURT: Okay. Thank you.

MR. HEDLUND: Good afternoon, your Honor. Dan Hedlund, Gustafson Gluek, also for the Plaintiff class.

THE COURT: All right. Thank you. Good afternoon.

MR. STENERSON: Good afternoon, your Honor. Todd Stenerson on behalf of Blue Cross Blue Shield of Michigan.

MS. MOSSMAN: Rachel Mossman on behalf of Blue Cross Blue Shield of Michigan.

MR. RHEUME: Thomas Rheume on behalf of Blue Cross Blue Shield of Michigan.

MR. PHILLIPS: Robert Phillips, in-house counsel, Blue Cross.

THE COURT: Tell me your name again.

MS. MOSSMAN: Rachel Mossman.

THE COURT: All right. Okay. Thank you. You may be seated.

Oh, there are more counsel here I know. The people at the tables though could be seated so I can see the rest of them, okay.

MR. ANDREWS: Christopher Andrews, objector.

THE COURT: Okay.

MR. WALTERS: Brian Walters, on behalf of a group of self-insured objectors, your Honor.

THE COURT: Okay. Very well. No one else needs to put their appearance on? No. Okay. All right. Very good.

We're here on the class action fairness hearing and the class Plaintiffs' motion for attorneys' fees, reimbursement of expenses and payments of incentive awards to class representatives, and also we're here on the Varnum firm's motion for attorneys' fees, and also a motion for leave to file a response to the Defendant Blue Cross memorandum in support of motion for final approval.

And no objections were filed to that so does anybody object to me granting it?

MR. MILLER: No, your Honor.

THE COURT: Okay. So that's then granted. I also have objections filed to the settlement agreement by

Mr. Andrews and also by the entities represented by the Varnum firm. And so unless you'd like to proceed in a different way, what I thought we might do, which would not be the ordinary course, but I think it might be useful in this instance, would be to hear from the objectors first, and then you would have an opportunity to respond to the objectors and then to make your argument.

Do you have any objection to doing it that way?

MR. MILLER: No, your Honor.

THE COURT: Okay. And so I would propose that we hear from Mr. Andrews first and then from Mr. Walters, and then we would hear from -- I don't know what order the Plaintiffs would want to go.

Mr. Miller, would you want to go first or Mr. Small?

MR. MILLER: Likely Mr. Small. He will address the merits of the settlement and I will address the issues regarding fees.

THE COURT: Okay. All right. Very well. And then we would hear from Blue Cross Blue Shield.

MR. STENERSON: Yes, your Honor.

THE COURT: And that would be Mr. Stenerson?

MR. STENERSON: Yes, your Honor.

THE COURT: Would you be arguing and no one else?

MR. STENERSON: I hope not.

THE COURT: Okay. All right. You're not purporting

to be in charge of that table, are you?

MR. STENERSON: No, ma'am.

THE COURT: Okay. All right. Very good. That's how I'd like to proceed. Do you all have any objection to that?

MR. WALTERS: No, I don't, your Honor.

THE COURT: If you want to move down to the first row so that you can hear better, that's fine. And let's see, everyone at this table, just move down a little bit toward my left, and then I can have a good view while also having a view of the person at the podium.

Mr. Andrews, if you'd hike to go to the podium.

MR. ANDREWS: Can I --

THE COURT: That's fine, and state your full name and make your presentation.

MR. ANDREWS: Good afternoon, your Honor. My name is Christopher Andrews.

THE COURT: Okay. Move the mic a little bit toward you. You have to pull the whole thing. Right. Okay. And then just speak into that tip of it.

MR. ANDREWS: Good.

THE COURT: Yes.

MR. ANDREWS: I'd requested ten minutes of my presentation. I'm going to cut that down to five minutes, six minutes so I'm going to combine.

THE COURT: You can take the ten minutes because I'm

perfectly satisfied probably everyone else will take ten minutes. Am I mistaken about that?

MR. ANDREWS: No. I'll take the ten minutes.

THE COURT: If you feel like you don't need to take it, you don't have to, but you're invited to take it if you wish to.

MR. ANDREWS: The proposed settlement has numerous fatal flaws that involve lack of standing in under Article 3, issues involving due process, Rule 23 violations, a multitude of errors in the amended agreement and the preliminary approval order. The inflated and undocumented fee and expense issue that, separately and combined, prevent approval.

Next the material Rule 23 and due process law to the notice program. Notice must be given, moreover, "in a form and manner that does not systematically leave an identifiable group without notice."

Mendoza versus Tucson School District, 623 F.2d 1338, 1351 Ninth Circuit 1980, "*Mandujano versus Basic Vegetable Food Products, Inc.*, 541 F.2d 832, 853 Ninth Circuit 1976. In this case, the lack of Spanish translation of the long notice, legal notice and claim form bars 100,000 Michigan class members who can't read the default English-only notice from participating because they can't understand their rights, the case and settlement information in the mailed notice, the legal notice and that is on the class website. They can't fill out and file

a claim form. They can't fill out an opt-out form. They can't object or be heard which causes violations of Rule 23(e)(1), 23(e)(2), 23(c)(2), 23(c)(2)(B) and due process. That segment is forced to walk away with their rights trampled and damages left to be collected by others and they don't even know it.

A simple tab changing the English-only notice and claim form into Spanish on the website, for example, was all that was needed to prevent the obvious Rule 23 and due process violation, but class counsel plum forgot in their rush dash for cash.

I do have an exhibit using U.S. Census figures.

THE COURT: I'm sorry, I didn't hear your last statement.

MR. ANDREWS: I do have an exhibit from the U.S. Census showing 100,000 number, which I leave for the Court.

THE COURT: All right. And have you given that to all the other counsel?

MR. ANDREWS: No, I have not.

THE COURT: Okay. Show it to them to see if they have any objection.

MR. MILLER: We have no objection, your Honor.

THE COURT: Okay. Hand it across the aisle. No one has it so that's why we're passing it.

MR. MILLER: Understood.

MR. STENERSON: No objection, your Honor.

THE COURT: Okay. Very good. Do you want to look at it as well?

MR. WALTERS: I'm okay, your Honor. Thank you.

THE COURT: Very good. Then it's admitted. Do you have any -- you can pass it right here to Miss Daly. Let's mark it Exhibit 1 to his oral argument, okay. All right. Go ahead.

MR. ANDREWS: The next issue I'm bringing up, I did give class counsel a head's up in two e-mails I was going to be discussing this today.

THE COURT: So is this something that you did not discuss in your written objection?

MR. ANDREWS: It was discussed but not in as much detail as it is right now.

THE COURT: Okay.

MR. ANDREWS: Thank you. Next, the missing invalid named Plaintiffs that lack standing.

THE COURT: The missing?

MR. ANDREWS: The missing invalid named Plaintiffs that lack standing. Under Article 3, the standing comes first, merits come second. To establish Article 3 standing, the Plaintiff must show that it has, one, suffered injury in fact; two, it is fairly traceable to the challenged conduct of the Defendant; and, three, that it's likely to be redressed by favorable judicial decision. *Spokeo, Inc. versus Robins*, 136

S.Ct. 1540, 1549, 2016, ID at 1547. All named Plaintiffs need standing, even if each presents similar legal claims, regardless of the form of relief they seek. Before they may act, the courts must ensure their power to act. I quote, "Typically, however, the standing inquiry requires careful judicial examination of a complainant's allegations to ascertain whether the particular Plaintiff is entitled to adjudication of the particular claims asserted." ID at 752, emphasis added. *Allen versus Wright* 468 U.S. Supreme Court 737, 1984.

That is not what was done in this case. In the complaint as currently written, which this deal was based on, not one of the name Plaintiffs have damages and therefore lack standing under Article 3. See Blue Cross Blue Shield of Michigan document 328. More importantly, the class should not be certified because doing so would violate various provisions of Rule 23 and substantive law.

Class counsel and the named Plaintiffs don't want standing to be looked at. A couple of law firms are sharing lawyers illegally, billing the class twice just like in the State Street case. The Court should outright dismiss those firms that are engaged in fraud on the class and then dismiss the other firms who stood by and did nothing since they were made aware of this four-and-a-half years ago.

It is well-known that under Article 3 of the United

States Constitution federal courts only have jurisdiction over, quote, "live cases in controversy," See e.g. -- excuse me.

I can hear you. Would you please be quiet?

THE COURT: Okay. You should address that, Mr. Andrews, to the Court not to the parties directly, okay?

MR. ANDREWS: Oh, sorry.

THE COURT: But we can hear you. If you'd be a little quieter, that would be helpful.

MR. MILLER: We apologize, your Honor.

THE COURT: It's okay, you might want to do something with the mic like turn it.

MR. ANDREWS: See e.g. *Spencer versus Kemna* 523 U.S. Supreme Court 1, 7, 1998, *AM versus Butler* 360 F.3d 787-790 Seventh Circuit 2004.

THE COURT: Are those cases cited in your objection?

MR. ANDREWS: No, they're not.

THE COURT: So the cases that you're referring to were not cited in your objections --

MR. ANDREWS: One of them -- two of them.

THE COURT: Let me finish my statement, please.

MR. ANDREWS: Oh, sorry.

THE COURT: The cases that you cite to that were not cited in your objection, you need to provide the Court with a written citation of them, okay?

MR. ANDREWS: Sure. I'll get it in the mail

Saturday, if that's okay, or do you want copies of this?

THE COURT: If you can make a copy of that, if it has your citations on it, that's fine. It's just that they're read into the record. I haven't had a chance to look at them. I'm not aware of them if somebody else didn't cite them.

MR. ANDREWS: Sure.

THE COURT: And so if you're going to cite them orally, you need to give them to me in writing.

MR. ANDREWS: Yes, ma'am.

THE COURT: Okay. All right. You may proceed.

MR. ANDREWS: The cases in controversy requirement demands that parties in a federal case always maintain a personal stake in the outcome of litigation. See *United States Juvenile Male* 131 Supreme Court 2860-2864 2011. Spencer, 523 U.S. at 7. In 2010, in *Wal-Mart Stores versus Duke,* the Supreme Court breathed new life into Rule 23's stringent requirements. *Duke*, 131 Supreme Court at 2561. Plaintiffs in that case, like in this case, can't prove that they can satisfy each element of Rule 23. So the class can't be certified.

The Ninth Circuit's decision in *Hyundai versus Kia Fuel Economy Litigation*, Number 15-56014, 2018 by, let's see, Ninth Circuit, January 23rd, 2018, supports decertification in this case as well because the plaintiff's purported evidence of damages is not sufficient to prove class-wide damages because damages vary from class member to class member and many don't

have damages at all.

Federal courts, it bears repeating, are "courts of limited jurisdiction." *Kokkonen versus Guardian Life Insurance Company of America*, 511 U.S. Supreme Court 375-377, 1994. "Article 3 requires federal courts to satisfy itself to its jurisdiction over the subject matter before it considers the merits of the case."

Ruhrgas Ag versus Marathon Oil 526 U.S. Supreme Court 574-583, 1999. "A failure of standing is a jurisdictional defect that prevents a court from adjudicating the merits of the case." *Whitmore versus Arkansas* 495 U.S. Supreme Court 149-154 1990. *Allen versus Wright* 468 U.S. 737, 750-754 1984. The Court may not be able to make a ruling in this case based on lack of jurisdiction.

I'd like to touch on the fee issue.

In the Sixth Circuit's reversal of this case, the panel criticized the partner fees of $700 an hour that rewarded as "Bentley" rates. When the maximum rate in this area is $425 an hour, that assumes a lawyer has 25 years of experience and is in the top five percent of all lawyers in the area.

The last 2,657 hours of "inflated work" that lawyers charged to the class, after the appeal reversal came down, totals an astounding $4,250,000 in fees. Broken down, this is a "Bugati" hourly rate of $1,600 an hour. It's clearly a fraudulent, inflated rate. Class counsels' claimed blended

rate in this case that they demand is clearly fraudulent and can't be used as the basis for any award calculation, Lodestar, or percent of fund.

On October 1st of 2018, a federal judge in Illinois in a case titled *Ocwen Loan Servicing* denied a $17.5 million-dollar TCPA settlement over excessive attorney fees, and the Courts reject this deal here as well.

Based on the evidence -- my summary. Based on the evidence in the record, the proposed settlement is still not fair, reasonable and adequate under Rule 23(e). So the Court should reject this deal and order class counsel to reimburse the Defendant for all of its fees and costs it incurred as the Defendant requested.

The right and lawful thing to do in this case is to decertify the class based on the lack of jurisdiction or dismiss the action with prejudice. That ends my presentation.

THE COURT: Okay. Thank you very much.

MR. ANDREWS: Thank you for your time.

THE COURT: Do you have another copy of it that has the citations in it?

MR. ANDREWS: The citations is what I just read off.

THE COURT: Your case citations, are they in your document?

MR. ANDREWS: Yes, that I just read off, correct. I'll leave copies for the young lady here.

THE COURT: That would be great.

MR. ANDREWS: Okay. Thank you.

THE COURT: Thank you very much. Okay. On behalf of the 26 companies represented by the Varnum firm, Mr. Walters, are you going to argue for them?

MR. WALTERS: Yes, I am, your Honor. Thank you.

THE COURT: All right. Very good.

MR. WALTERS: Good afternoon. May it please the Court. As the Court is aware, the settling parties here, Plaintiffs and Blue Cross, have the burden of proving that the proposed settlement for just under $30 million, of which a net amount of less than $15 million would actually be distributed to the class, is fair, reasonable, and adequate to the approximately seven million potential class members affected by this case. It is not the objectors' duty to prove that the settlement is unfair, it is the Plaintiffs and Blue Cross' duty to prove --

THE COURT: I understand who has the burden of proof. I just had you all go first because I thought it would be easier to set forth, since there are only two objections, so that they could respond to them -- those arguments and then they could also make their case.

MR. WALTERS: I appreciate that, your Honor, and I think that process makes sense. So I wasn't trying to indicate otherwise.

We've now had the opportunity to review the record or at least the bulk of the record. There are still some redactions based on the Court's decisions with regards to particular documents. It's about --

THE COURT: Tell me that again. You haven't had an opportunity to review all the documents that the Court ordered could be unsealed?

MR. WALTERS: We have had the opportunity to review the record, other than portions of certain documents that the Court allowed to remain redacted. The Court went through it, a document-by-document process. There were certain documents where third parties, for example, said hey, there's portions of this that we think are still confidential, and so the current record does have some blackouts, some strikeouts. We've had a chance to review everything other than those --

THE COURT: That the Court allowed.

MR. WALTERS: That's correct, your Honor. It's about 19,000 pages, and the reason why I point that out, your Honor, is that it's still, just for context here, is really a tiny fraction of the millions of pages of documents that were produced in discovery, the hundreds of thousands of pages of deposition testimony, the terabytes of electronic data that were exchanged in discovery. What's in the court record, which is of course what we're -- we have the ability to look at, and it's what the Court must base its decision on, what's in the

court record is really only a tiny sliver of the entirety of the case, and that's largely because there wasn't a trial, there wasn't a final pretrial. There's not been summary judgment briefing. So there hasn't been a reason, in the course of the case, for the parties to really put all of that substantive evidence before the Court before the course of the settlement.

So the main substantive documents, the main information in the record that really tells us anything about the merits of the case are the expert reports because we had expert reports that were challenged under the *Daubert* standard, and so there was both submission of the reports and briefing around the reports, both in this class action case, and also, importantly, in the related Aetna standalone lawsuit involved expert reports that were unsealed that relate very much to the MFN agreements.

So we did not have the ability to go through the millions of pages of the record in terms of what was produced in discovery. What we did have the ability to do is look at what the expert said. The expert did that work. The expert spent thousands of hours most likely reviewing all that information, analyzing it, coming up with their conclusions and opinions, which were then set forth in these expert reports. So that's why there's a criticism in the, particularly I think, the Plaintiffs' response in particular calls the objectors to

task for why aren't you actually citing the deposition testimony? Why aren't you actually citing the underlying documents in the case? Those are not part of the court record. Those are not available to us. We cited what was available to us, which is the expert reports, your Honor.

There are two basic conclusions that can be drawn from the expert reports, two key conclusions, one, that there is substantial evidence supporting the Plaintiffs' claims that the Most Favored Nation agreements did in fact increase the amount paid by class members for hospital services.

THE COURT: Okay. So before you get to that, so I clearly understand your argument, your argument is that you did not have an opportunity to view any of the things that were ultimately unsealed?

MR. WALTERS: That's not what I'm saying, your Honor. What I'm saying, your Honor, is that the totality of what was ever filed with the Court in this case, when you look at the Page ID number, the consecutive, you know, numbering system that the ECF system has, totals just under 19,000 pages. We've had the opportunity to see all of that 19,000 pages. Some of those pages still have portions that are blacked out, but we've had a chance to see those 19,000 pages. What we haven't had a chance to see and what we haven't even asked to see, but I'm just putting it in context, are the millions of pages of the record in terms of what was actually exchanged during

discovery, 169 --

THE COURT: That's my concern. When you say of the record. It's not of the record --

MR. WALTERS: That -- that --

THE COURT: It's not of the record, it's not filed with the Court.

MR. WALTERS: That's correct. My verbiage is probably not accurate.

THE COURT: Well, I don't want it to be misunderstood by the Court of Appeals so that they think that I should have, because something was -- sounded like it was in the record, have opened that up if it was never filed with the Court.

MR. WALTERS: Okay.

THE COURT: Everything that was ever filed with the Court, that remains -- that's not redacted, you've had an opportunity to look at?

MR. WALTERS: Yes, just like every other member.

THE COURT: And your argument is that there's lots more discovery that was exchanged that was never filed.

MR. WALTERS: That's correct, your Honor.

THE COURT: And you haven't asked for that either, is that also your understanding?

MR. WALTERS: I -- we have not. We did, if the Court may recall, back after the Sixth Circuit's decision, file a motion to intervene as an interested party in the case, which

would have potentially given us the ability to see that, based on further decisions. The Court denied our motion to intervene and indicated that our opportunity to participate was through this objection and fairness hearing process.

THE COURT: Okay.

MR. WALTERS: So the first conclusion that can be drawn from the record, in terms of the expert reports being the main substantive evidence in the record, is that there is significant evidence supporting the merits of the Plaintiffs' claims.

The second thing that can be gleaned from the record from those expert reports is that none of the experts have offered the opinion or conclusion that the most that the class could recover in trial on the merits is $118 million.

The premise for the settlement, in evaluating the fairness of the settlement, has been consistently framed by the Plaintiffs and Blue Cross as well, the most the class could ever recover is $118 million and, therefore, this settlement is reasonable as a percentage of that $118 million recovery.

The actual evidence that I'll point to in just a minute from those expert reports, there is no opinion, there is no conclusion from any expert that says that $118 million is the damage number, is the maximum recovery. In fact, Dr. Leitzinger, the Plaintiffs' expert explicitly says exactly the opposite and I'll get to that in just a minute.

I want to first talk about the evidence that does support the merits of Plaintiffs' claims. First, and very significantly, I want to remind the Court that the Sixth Circuit, in its opinion at least to some extent, indicated that it already examined the record and already found that Blue Cross' Most Favored Nation scheme raised hospital costs for Blue Cross customers and for everybody else.

At Page 303 of the Sixth Circuit's opinion, there's a paragraph that starts as follows, and from the Sixth Circuit, the opinion states, "The record in this case also reflects that the greater the spread between Blue Cross' rates and the minimum rates for other insurers, the higher the rates that Blue Cross was willing to pay. For example, Blue Cross would agree to pay a certain rate if a hospital agreed to charge other insurers 10 percent more than Blue Cross, but if the hospital agreed to charge other insurers even more, say 20 or 30 percent higher rates than Blue Cross, then Blue Cross would agree to pay even higher rates. Thus, the effect of Blue Cross' market power was not to lower its customer's rates, as typically advertised, instead, the effect was to raise them for Blue Cross' customers and everyone else while preserving or expanding Blue Cross' market share."

Notably, your Honor, this is not the Sixth Circuit saying, well, this is what the complaint says or this is Plaintiffs' theory of the case. The Sixth Circuit says the

record in this case also reflects these findings. I think that's very important, your Honor. The Sixth Circuit, while vacating the decision to approve the initial settlement and sending it back to the Court to start the process anew, gave some pretty strong hints to the Court on this issue and on a number of other issues as to what the Sixth Circuit was thinking and to what some of the Sixth Circuit's concerns were. And unfortunately here, the Plaintiffs and Blue Cross essentially ignored those hints and decided to plow forward with essentially the same settlement agreement that was presented to the Court the first time.

So I'm going to point to the Sixth Circuit's opinion a few different times, mostly just to indicate that there's already been some degree of direction, whether you might say it's dicta because there wasn't final holdings on that, but Sixth Circuit has given some guidance here as to real concerns with the settlement.

Turning now to the two expert reports that are discussed in our objection. First is Dr. Leitzinger's report, the Plaintiffs' expert here in this case. He and his research team were paid more than two-and-a-half million dollars to analyze these millions of pages of documents produced in discovery, the tens of thousands of pages of deposition testimony, the terabytes of data, and to analyze and summarize those and offer an opinion in support of class certification.

And that's really important that the Court be reminded of the context of what that report was for.

Dr. Leitzinger's report was not a final report in support of whether there was an antitrust violation, not a final liability report, and it was not a final damages report. This is at the class certification stage of the case. His was a report on whether the Rule 23 factors for certifying a class were met, the numerosity, commonality, typicality, those factors that I'm sure the Court is very familiar with. That was the purpose of Dr. Leitzinger's report, not to offer a final damages number as to the most that the Plaintiffs could recover -- or the class rather could recover at trial.

The report had four specific purposes that are described on Page 4 of the report on Paragraph 9. First was to analyze the impact of the Most Favored Nation agreements on the amounts paid for hospital services. Second was to determine whether all or virtually all of the class members paid some overcharge, that kind of commonality function. Number three, determine whether the total overcharges incurred by the class as a whole could be calculated on a class-wide basis. And number four, to determine whether economic issues associated with proving the antitrust violation would involve evidence that's common to the proposed class members.

So Dr. Leitzinger's analysis is all about whether or not this should be a class case or whether it should be

thousands of individual cases that are pursued separately. That was the purpose of Dr. Leitzinger's report.

Dr. Leitzinger and his staff spent thousands of hours on his work. He put together a 137-page report. We did not attempt to regurgitate that whole report in our objections. We did attach it to our objection to make sure that it was included in the record. And Dr. Leitzinger reached four key conclusions that are in Paragraph 11 of his report at Pages 4 through 6:

That the Most Favored Nation scheme did in fact increase the amount paid by class members for hospital services; that all or virtually all of the class members likely paid at least some additional amount as a result; that the total amount of overcharges could be calculated on a class-wide basis and didn't just have to be calculated on an individual by individual basis; and that much of the evidence relevant to proving that the Most Favored Nation scheme violated antitrust laws was common to the class as a whole.

Those were his conclusions.

Notably missing here is any conclusion that the class suffered $118 million in damages. That was not one of Dr. Leitzinger's conclusions.

Our objection pointed to just a few specific examples where Dr. Leitzinger cited specific documentary and deposition evidence to support his conclusion. So Dr. Leitzinger's report

does not attach as exhibits to it those millions of pages of documents produced in discovery. He references by Bates number those documents produced in discovery. He references by page number those depositions, but all of the backup is not attached to Dr. Leitzinger's report and all of this backup, as a result, is not part of the court record.

But we did point out a few examples of specific examples from Dr. Leitzinger's report, that the Most Favored Nation scheme resulted in an additional $1.5 million being paid for hospital services at the Sparrow Health Ionia; that it resulted in additional $7 million being paid for hospital services at Ascension Health, that it resulted in an additional $25 million being paid for services at Beaumont. These are just a few of the examples that were called in our objection, just as examples from Dr. Leitzinger's report.

The last thing I want to leave the Court with from Dr. Leitzinger's report is his conclusion with regard to damages, because he did not and was very explicit in saying that he was not offering a final report on damages. He was, instead, illustrating that damages were capable of being calculated class wide. Paragraph 76 of Dr. Leitzinger's report makes this extremely clear and this is what he says in Paragraph 76, he says the following:

"In total, the aggregate overcharges shown in by illustration for all affected combinations is approximately

$118 million. This illustration does not represent a final opinion on my part regarding the amount of overcharges."

I'll read it again: "This illustration does not represent a final opinion on my part regarding the amount of overcharges. Rather, it demonstrates the basis for my conclusion that those overcharges can be calculated in a class-wide formulaic basis."

Again, going back to the purpose of the report. The purpose is to show that this can be a class action. The purpose was not to show how much damages the class suffered.

Turning now to the Aetna lawsuit. The Court's orders after the remand from the Sixth Circuit also allowed us to examine previously sealed documents in the standalone separate litigation, and there is an even more extensive expert report prepared by Aetna by Dr. Christopher Vellturo. It's 244 pages with more than 1,100 footnotes in Dr. Vellturo's reports and his conclusions are similar to Dr. Leitzinger's. He and his process is the same, but again, it cites by Bates number, the underlying documents. It cites by page number the deposition testimony, but it doesn't attach all of that to the record.

Dr. Vellturo concluded that Blue Cross paid more to hospitals in exchange for the Most Favored Nation agreements, and, importantly, that these higher costs for hospital services were then passed on by Blue Cross to its customers in the form of either a direct passthrough for the self-insured customers,

like my client, for whom Blue Cross just acts as a claims administrator but the client, our businesses, actually pay the bill, or in the form of higher premiums for fully insured individuals. Blue Cross was not just eating these additional costs themselves, it was passing them onto its customers.

And of course the reason in the market that Blue Cross could actually pass those onto its customers is because those same costs were also being passed on to HAP and Aetna and Priority Health, et cetera, so Blue Cross could say it wasn't putting itself in a competitive disadvantage by eating those costs itself, it was fully able in the market to be able to pass on those costs to others.

Dr. Vellturo's report described more than a dozen examples where there were hospital rates with Blue Cross that increased as a result of the Most Favored Nation scheme. Some of those are the same examples noted by Dr. Leitzinger, which is no surprise; they're looking at the same set of underlying documents. Our report -- our objection noted just one additional example from Dr. Vellturo at Marquette General Hospital, where Marquette General Hospital ended up with a 15-percent rate hike for hospital services explicitly tied to the Most Favored Nation between Blue Cross and Marquette General Hospital.

Dr. Vellturo's conclusion was that in total, he had determined that Blue Cross had paid hospitals over $100 million

more in exchange for the Most Favored Nation agreements, and that that $100 million or more in additional hospital costs were passed on by Blue Cross to its self-insured customers and fully insured individuals, namely, the class members.

The Court has accepted -- has granted the motion to respond to Blue Cross' brief on the issue of the final approval. I don't know if the Court has read that brief or not, but there was an issue in that brief about Dr. Vellturo's testimony and whether or not it had been excluded previously in the Aetna decision. I don't want -- our brief on that issue is very short. It's only about two-and-a-half pages. I'd be happy to just say, "please read the brief," but if you'd like me to summarize the argument on that issue, I'll do it.

THE COURT: That's up to you, sir.

MR. WALTERS: Okay. Well, I guess I'll go ahead and very briefly summarize that then.

Blue Cross argued in its brief that the testimony from Dr. Vellturo, the opinions from Dr. Vellturo that I just talked to the Court about, the over $100 million in additional hospital costs as a result of the Most Favored Nation agreement being passed on, that this opinion had been excluded by this Court on a motion in limine in the underlying Aetna case, and that's just flatly incorrect. It's not true.

What the Court did in the Aetna case, and this is at Page 14 of its opinion, is the Court excluded some 30(b)(6)

deposition testimony from Dr. Vellturo regarding the economic impact on Aetna, not on the class members, not on self-insured customers or fully insured individuals, they impact on Aetna in Aetna setting its premiums as a result of the Most Favored Nation scheme, and the reason why your Honor excluded that testimony is because it wasn't in Dr. Vellturo's expert report and it wasn't based on documents that had been exchanged in the course of discovery.

By direct contrast, what we are relying on, what we are citing to the Court are portions of Dr. Vellturo's expert testimony -- expert opinions in his expert report disclosed in that case, relating specifically to his findings concerning the additional hospital costs that Blue Cross paid and then in turn passed onto its customer base of over $100 million.

So there's two conclusions to draw from the expert reports, one, there's substantial evidence that the Most Favored Nation agreements harmed the marketplace and caused class members to pay for more hospital services; and, two, that there is initial damages analysis that suggests well in excess of $100 million of damages, but there is no final damage analysis for the class because the experts weren't asked to do that and the case wasn't at that stage of the proceedings.

One last point on damages, your Honor.

The experts did not include any multiplication, any treble damages or attorneys' fees that the Plaintiffs would be

awarded if they were successful at trial. The Sixth Circuit, in its opinion, strongly suggested at two different points of its opinion that an assessment of the reasonableness of the settlement should consider the treble damages that the class would receive if successful at trial. At Page 304 and at Page 308 of the Sixth Circuit's opinion, the Court both times framed the analysis of the fairness and reasonableness of the settlement in terms of evaluating the treble damages award that the Plaintiffs could recover if successful against the amount of the actual settlement.

And of course this makes sense to consider that. What is the Plaintiffs' best case day? It's a treble damages award if they're successful at trial, and that treble damages award is mandatory, not discretionary. So it's not a situation where you would have to discount in kind of an evaluating what might happen if the Plaintiffs are successful, that you'd have to discount for a possibility that the Court could choose not to give treble damages. Treble damages are mandatory if the Plaintiffs are successful. So in evaluating what the Plaintiffs damages are, the Court should be considering those treble damages.

So the real ceiling for the maximum recovery that the class could obtain is unknown. It hasn't been determined yet. There's nothing in the record that would tell us what that is, but it's certainly several hundred millions of dollars, not the

$118 million that is being argued somehow is the maximum that the class could possibly recover.

So we have what's been presented in the objection, what's been presented in the expert report, substantial evidence -- what's been noted by the Sixth Circuit in the record, substantial evidence that the Most Favored Nation agreements did in fact cause harm to the class.

Plaintiffs and Blue Cross, in their presentations to the Court, in their papers filed in the Court, still have not presented substantial evidence on their side showing why the settlement is reasonable and fair. The closest that they come would be in Blue Cross' brief -- final brief in support of the settlement. Blue Cross, for example, cites to the testimony of several hospital executives, who said during their deposition that hospital rates did not increase as a result of the Most Favored Nation agreements. They don't actually, you know, quote to the deposition testimony. They don't go into detail about it, but they say, oh, don't worry, the executive said this didn't actually cause any harm here.

Frankly, your Honor, I think that's hardly persuasive. I mean these are people who of course are trying to avoid any potential liability on their part for agreeing to this -- be a part of the scheme. It's directly contrary to the evidence, as described in Dr. Leitzinger's and Dr. Vellturo's report. It's contrary to the Sixth Circuit's view of the

record, and it's completely counterintuitive in terms of the just common sense view that a trier of fact would understand that when Blue Cross is coming to you as a hospital and saying, hey, we will pay you 15 percent more on hospital services -- using the example of Marquette General Hospital -- as long as you guarantee that you are also going to make Priority Health and Health Alliance Plan and Aetna and whoever else also pay a rate that matches or is even higher than Blue Cross. It's counterintuitive to think that that would not have the impact of raising hospital rates.

Blue Cross' other arguments are, frankly, baffling. They offer some other arguments as to why we're not -- Plaintiffs are not likely to succeed on the merits. They say that Blue Cross' use of the Most Favored Nation clauses was inconsistent and, therefore, you know, didn't show an intent to control the market. Well, yeah, they did only have them at half of the hospitals in the state of Michigan. They did sometimes only require a match for Most Favored Nation, and sometimes they had Most Favored Nation plus 10 percent. Sometimes they had Most Favored Nation plus 20 or 30 percent, but that's hardly an indication that there wasn't an antitrust violation here to say, well, we didn't do it at every hospital in the state.

Blue Cross also argues they use these Most Favored Nation clauses to prop up smaller hospitals and to prevent free

riders. That's just lawyer talk for saying, yeah, we used to pay more to smaller hospitals, and by preventing free riders, making sure that other insurers also paid more. It's just a simple way of characterizing that they were manipulating the market. They were increasing costs for hospital services and, of course, the critical component of that was those costs were ultimately being borne by Blue Cross' customers.

They also point out that other insurers were also using Most Favored Nation agreements. Well, maybe there's other antitrust claims to be pursued out there. Although, none of those other insurers have the same type of market power of course that Blue Cross does, but that's hardly an excuse for Blue Cross' actions.

The Plaintiffs' arguments in many ways are even worse, are even thinner than this in terms of trying to justify this settlement. Most of what the Plaintiffs do is repackage the same generic litigation risk that they cited to this Court last time, but not explaining why those risks are significant in this case, drilling down to what are the specific facts and issues in this case that make these significant risks.

They put out a litany of potential risks. The expert testimony could be excluded, because the *Daubert* motion was pending at the time of the settlement. The final damages report might show a smaller number of damages. The case could get dismissed on summary judgment because there hasn't been

summary judgment briefing yet. The trial could be complicated, because there's different geographic markets potentially that would be involved, almost sub trials within a trial as to different geographic markets. The Plaintiffs could lose at trial. The Plaintiffs could be awarded less than their entire damages at trial. The Sixth Circuit could reverse because antitrust cases are complicated and often get reversed on appeal.

But all of these arguments are thrown out there as generics, not with any sort of discussion of how significant those risks are in the context of this case, in the context of the record before the Court in this case. There's no deeper dive to explain why those risks are so significant in this case to justify what we believe is an artificially low settlement amount.

Plaintiffs' other justification that they rely on pretty heavily in their last round of briefing is that because Health Alliance Plan opted out of the class and pursued its own claim, that that means that the settlement is now even more fair or even more reasonable as a result, but that's not persuasive, your Honor. As both Dr. Leitzinger and Dr. Vellturo noted, whatever amounts HAP paid -- when HAP ends up paying more for hospital services because there's a Most Favored Nation agreement where Blue Cross raises costs and therefore their costs get raised as well. When HAP ends up

paying more, HAP is also passing those on to its customers. It's passing it on to its self-insured customers as a direct passthrough. It's passing it on to its fully insured customers through higher premiums. HAP's opt-out doesn't bar the claims of class members, who were insured by HAP, who then paid more for hospital services.

So out of that seven million potential class members, there are presumably hundreds of thousands of them who are with HAP, and their claims are not barred because HAP itself opted out. Put another way, HAP, in its litigation, was not under any obligation in terms of -- I believe in terms of any, you know, settlement that it received or judgment that it received. HAP was not under an obligation to turn around and refund that to all of its customers. HAP was pursuing its own business claims. The individualized harm to the self-insured customers and fully insured customers of HAP are still part of this class action and are still part of that recovery.

Ultimately, your Honor, a net settlement of less than $15 million for seven million potential class members is unreasonable. It's roughly $2 per potential class member. On its face, given the state of the facts before the Court, given the fact that there are multibillion dollars spent a year on hospital care in the state of Michigan, it's not, on its face, a reasonable amount.

The parties try justify that number by saying well,

it doesn't matter that are there are seven million potential class members because the money is distributed to all the class members, right? You know, you have to file a claim to get a distribution and there have been approximately 84,000 claims filed, according to the most recent filings by the Plaintiffs. And if you took 84,000 claims filed and you divided up that roughly $15 million pot, you'd end up with about $175 per claimant and, on its face, well, that sounds a little bit better. $175, that's real money. I can, you know, have a nice dinner. You know, I could do something with that. It's more than $2 for a settlement.

But we would submit, your Honor, that it is inappropriate to justify the meager settlement amount based on the fact that so few potential class members filed claims. 84,000 claims is just over one percent of that seven million potential class members. Respectfully, your Honor, that is a pathetic participation rate in the class settlement, and it strongly suggests that one or both of two things is going on, either, one, that the claims process is too burdensome so a few people are filing claims because of that; and/or, two, that the settlement amount is too minimal for most class members to bother filing claims.

At the end of the day, the flip side of, well, there's 84,000 claims filed is that over 6.9 million potential class members will get nothing under this settlement if it is

approved today. Nothing. We would respectfully say that is compelling prima facie evidence that this settlement is unreasonable.

The other objections that we make to the settlement, besides the settlement amount compared to the likelihood of success, are well-documented in our brief and I'll touch on them only very briefly.

The attorney's fee award to the Plaintiffs' counsel is based on unreasonable hourly rates. They're described as Bentley rates by the Sixth Circuit, and there's no backup support presented for the work done by Plaintiffs' counsel to justify the massive number of hours that were expended in the case. By contrast, your Honor, in our motion for attorneys' fees, which will be discussed later, we attach the backup. We attach the contemporaneous time records showing for each day, each entry describing what we did and we received no objection to any of those time entries in terms of what was presented to the Court for approval. We don't have that here in this case, your Honor.

The Plaintiffs' counsel really tries to excuse that by saying, well, we're really trying to present this more as a percentage of the fund case. It's not so much about a Lodestar calculation and an hourly rate times number of hours worked, this is a percentage of the fund case.

Your Honor, we would submit that the attorney fee and

expert cost being requested by Plaintiff are out of proportion to the overall settlement of the case. When you look at the fact that more than half of the $30 million settlement is going to Plaintiffs' counsel, either in attorneys' fees or in reimbursing their costs, reimbursing expert fees, or in class administration fees in terms of giving notice. The fact that less than half of the settlement amount is being paid to class members is unreasonable, even under a percentage of the fund theory for recovery.

We also touched very briefly on the incentive awards, which the Sixth Circuit described as bounties of up to $50,000 per Plaintiff. Those are grossly excessive and create an improper incentive for the Plaintiffs to accept settlement and to sell out the rest of the interests of the class.

The Sixth Circuit noticed very serious concerns about these awards and essentially said the burden was on the Plaintiffs to demonstrate with evidence the amount of time that the Plaintiffs actually spent on this case. The Sixth Circuit acknowledged that it might be reasonable to reimburse the Plaintiffs some sort of hourly rate for the time that the Plaintiffs actually spent sitting in at a deposition, answering interrogatories, you know, participating in the case. Plaintiffs have not done that. Plaintiffs have not presented any information or evidence that would allow this court, or the Sixth Circuit on appeal, either to look at the record and say,

okay, you know, this Plaintiff spent 500 hours on the litigation of their time and they should be reimbursed, you know, $100 an hour and so that calculates out to $5,000 or $50,000 whatever the math is. I apologize. But you understand what I'm saying, your Honor. None of that -- none of that is in the record here.

Finally, back to the claims process itself being unduly burdensome. We objected to this before, and we continue to object to this now. The claims process for self-insured plans like my clients require them to submit electronic -- require them to submit claims data for all of their tens or hundreds of employees of what day they were in the hospital, what hospital they were at, the whole list of information that's required in the claims form.

The problem with this, your Honor, is that if you're a self-insured customer whose claims are being administered by a third-party administrator like Blue Cross, Blue Cross is the party who has that information, and we cited an example of this in our objection and in our prior objection with regard to one of our clients, Petoskey Plastics. Petoskey Plastics, one of our clients, was interested in submitting a claims form. They didn't have the electronic claims information needed to submit to the claims administrator on the class action settlement. What do they do? They go to Blue Cross. Blue Cross is their administrator for hospital claims. They spent five hours

wrangling back and forth with Blue Cross in e-mails, phone calls, et cetera, to finally get the data from Blue Cross to then submit to the class action claims administrator.

That's absurd. Blue Cross is a party to the settlement. Blue Cross has absolutely full access to all of the information necessary for its customers, whether they're self-insured customers or whether they're individual insureds, to go into its records and say, okay, this person was in the hospital on this date for this service and, therefore, they have a valid claim in the class action settlement. Blue Cross should be made to do that as part of the claims process. It's unreasonable to put that burden on the class members.

Blue Cross argues in its briefing that the settlement doesn't require them to do that and it expressly excludes any obligation by Blue Cross to do that. That's precisely why the settlement should be rejected. Blue Cross should not be able to rely on the fact that the settlement let them out of this obligation. The settlement should be rejected because Blue Cross has every ability to do this as part of the claims process.

Again, the extremely small number of claims here, really, 84,000 out of seven million people itself demonstrates that the claims process is unreasonable and that the settlement is unfair.

So many of these concerns that I just got done mentioning

with the attorneys' fees award, with the incentive payments, with the claims process were hinted at, were discussed at some level in the Sixth Circuit's opinion.

THE COURT: How much weight do you think I should give to that?

MR. WALTERS: I think it is persuasive but not binding, your Honor. In other words, I mean I think it is dicta. It was not strictly necessary for the Court's decision because the Court vacated fundamentally based on the records -- the access to the records issue. However, I think it's a pretty strong hint, nudge, wink, what have you, that these are the concerns that the Sixth Circuit would like to see addressed the second time around.

I think the Sixth Circuit was appropriately careful to say, look, we're not going to take over the Rule 23 process from the trial court. The trial court has that obligation to do that, but we are going to give some indication as to what some of our concerns are to help give some guidance to the process and to really help the Plaintiffs and Blue Cross out the second time around. And they didn't do you any favors, your Honor, they just came back with the exact same deal instead of actually taking to heart what the Sixth Circuit had to say and reevaluating what the settlement would include, and it put you in a very difficult place as a result.

Frankly, I think given those indications from the

Sixth Circuit, it is highly likely, nearly inevitable, that if this settlement as-is is approved and goes up, it's going to be vacated again. It's going to be vacated on attorneys' fees or it's going to get vacated on incentive awards, or it's going to get vacated on the claims process, or it's going to get vacated just on whether or not the settlement itself, the dollar amount, is fair and reasonable. But there are so many hints and indications in the Sixth Circuit's opinion that it had real concerns about the substance of what was presented in that first round of settlement, that just sending up the same settlement, to me, seems foolhardy.

At the end of the day, the Plaintiffs and Blue Cross have not come remotely close to meeting their burden of proving that the proposed settlement is fair, reasonable and adequate to the class and, therefore, the settlement should be rejected.

Unless the Court has any other questions, that's the conclusion of my comments.

THE COURT: I do not. Thank you.

MR. WALTERS: Thank you, your Honor.

MR. SMALL: Good afternoon, your Honor. Dan Small for the Plaintiff class.

THE COURT: Okay. Thank you.

MR. SMALL: Thank you, your Honor. Let me depart from the presentation that I had planned to address one thing at the very outset in response to Mr. Walters' argument. He is

attempting to convince the Court that Dr. Leitzinger's estimate of damages is not really a damages estimate, and he bases that on some language in Dr. Leitzinger's report about his opinion not being final as to the amount of damages. That language, your Honor, is routine in every report I've ever seen done by an expert in support of class certification, for the very simple reason, your Honor, that that report is done for class early in the case where there may be more discovery. There may be more data. There will be responses to the expert report from the other sides' experts. So of course, an expert is going to reserve his or her right to modify his opinion or her opinion as appropriate if more evidence comes out.

But the really important point now, your Honor, is that was clearly Dr. Leitzinger's best effort to estimate damages in the case. No one, your Honor, does two-and-a-half million dollars of work in a case, reviews and works with and analyzes terabytes of data involving 60-million claims spanning seven years, does a sophisticated difference and differences regression analysis, and comes up with a conclusion that's detailed and well-articulated in his report, analyzing hospital by hospital and provider agreement by provider agreement what the damages are in this case.

Your Honor, it is one of the most sophisticated damages analysis I've seen. It involves a historically large data set that Dr. Leitzinger worked with. He did not hold back

in any way, your Honor. That is a good, sophisticated, accurate estimate of the damages in this case.

So what we have now, your Honor, and this was never mentioned by any objector, is a settlement for about $30 million that is equal to about 50 percent of the class's damages, and that is in part, as was mentioned, because HAP, the largest member of the class opted out and filed its own case.

Now, Dr. Leitzinger calculated $118 million in damages, but he also calculated that HAP had $58 million of the $118 million, leaving $60 million for the remaining class members as their damages. So when HAP opted out it, in effect, doubled the value of the settlement for the remaining class members. And that happened, your Honor, not by happenstance, but by the fact that class counsel negotiated a settlement that did not include an opt-out reduction provision, which is actually quite typical in a class action settlement where the Plaintiff class has to refund to the Defendant amounts in proportion to the amount of opt-outs.

We don't have that in this settlement. That is actually a highly valuable provision in the settlement that has now effectively doubled the value of the settlement, and, I might add, even net of fees and expenses in this case, your Honor, the settlement now is about 25 percent of the class's damages. So any way you look at is, this is an excellent

recovery for the class.

Now, the size of the recovery speaks for itself, your Honor, but I can give the Court the additional assurance that the settlement was negotiated by experienced class counsel, with long-standing reputations as zealous and effective advocates, who would never sell out the class, your Honor. Moreover, class counsel's interests have been fully aligned with the interests of the class. We get paid as a percentage or we are requesting to get paid as a percentage of the recovery. So the more the class recovers, the more the attorneys stand to recover, and because of that and because -- frankly, because of our professional obligation to the class and our concern for our reputation, we negotiated hard for every dollar we could get from Blue Cross.

The settlement gives no special treatment to Plaintiffs or their counsel. None. We are guaranteed nothing under the settlement. We will get attorneys' fees and the Plaintiffs will get incentive awards only to the extent the Court awards them in its discretion, in its sole discretion. Thus, your Honor, there's no reason in this case to doubt the judgment of class counsel that this settlement is in the best interests of class.

Now, because Dr. Leitzinger's damages estimate clearly shows that the settlement amount is reasonable in this case, an objector challenging the reasonableness of the settlement would

presumably want to show a mistake in Dr. Leitzinger's work or would offer a competing damage analysis that it claims was better or showed a larger recovery. The objectors here do neither of those things and, as I've mentioned, your Honor, there's every reason to believe that Dr. Leitzinger's estimate is accurate and it's the only estimate of the class's damages in this case.

Now, the Varnum objectors attempt to challenge the $118 million number indirectly. They do it by suggesting it's implausibly low because there are millions of class members who purchased expensive hospital care over eight-and-a-half years. Your Honor, there is nothing implausible about the $118 million number. Here's why. Nearly half -- nearly half of Michigan's general acute care hospitals had no MFN agreement with Blue Cross. The half that did typically had an MFN agreement for three or four years, not eight-and-a-half years, and for the MFN agreements that did exist -- and this is important, your Honor -- the Plaintiffs' burden was to prove causation; that is, to prove that the existence of an MFN agreement caused reimbursement rates to increase.

In fact, after two-and-a-half million dollars of work, your Honor, Dr. Leitzinger's work, the only one who's done this, shows that many of the MFN agreements did not cause reimbursement rates to go up. Here's why. Many of the agreements were with hospitals whose reimbursement rates

already complied with the MFN provision. They didn't have to raise rates at all to be in compliance with the MFN provision, had no effect on their reimbursement rates.

There were hospitals with reimbursement rates that were not raised to come into compliance with the MFN provision. So the MFN provision had no effect on their reimbursement rates. There were hospitals with reimbursement rates that were raised substantially more than was required by the MFN provision. So there's no ability, when they're raising rates more than required, to believe that the MFN provision had any effect on that increase.

So the fact is, your Honor, that many of the MFNs simply had no effect on reimbursement rates. That's the reality that the Plaintiffs are confronting and had to confront in this case and justifies this settlement and shows in fact that this settlement is an excellent result.

Now, this $85 billion number, which actually we didn't hear in the presentation today, but which features still prominently in the Varnum objectors' brief, is wildly over-inclusive. There are -- most of those purchases have nothing to do with this case. It includes purchases in the commercial segment from all general acute care hospitals in Michigan. So that's purchases from hospitals with no MFN agreement, nearly half of the general acute care hospitals in Michigan.

It includes purchases by Blue Cross, the Defendant in this case, who is excluded from the class. It includes purchases by HAP, who has opted out of the class and is not part of it anymore. It includes purchases by Aetna, another major insurer which is excluded from the class definition, and, as I've mentioned, it includes purchases for every day of eight-and-a-half years, even though the MFN agreements generally lasted for only three or four years.

Then I want to talk about the one other effort that the Varnum group makes to show that damages are bigger than $118 million and that is the Varnum group's reliance on the Vellturo report in the Aetna case.

First of all, that report is talking about a $100 million number or some others. It's not talking about billions of dollars, your Honor. So I don't know whether the Varnum group's view is that this is a billion-dollar case or $100 million case or something else. They have not told us.

The other important thing to know, your Honor, is that Dr. Vellturo was not a damages expert. He was Aetna's liability expert. He didn't measure Aetna's damages, let alone the class's damages. And his $100 million number, that was the amount that Blue Cross allegedly overpaid for MFN provisions. That number is not the result of any damages model by Dr. Vellturo. There is no benchmark group that he compared the reimbursement rates to that Blue Cross agreed to pay. There's

no regression analysis, your Honor. There's no empirical analysis. What he did was conclude that the entire Blue Cross reimbursement rate increase was due to a payment for the MFN provision.

That estimate may well be overstated, but regardless, the more important point, your Honor, is that is Blue Cross' alleged overpayments, not the class members. It's not an estimate of any class members overpayments. Blue Cross did not pass on those overpayments to customers. That's not how it works, your Honor. These are payments that Blue Cross made as an insurer. It doesn't get reimbursed, it doesn't pass it on, with the possible exception that maybe the Varnum group is referring to the fact -- and I did hear something about this -- that they were passed on in the form of higher insurance premiums.

I don't have an opinion on that, but I do know this, this case, your Honor, is not about an inflated insurance premium. This is a case about overpayments for hospital services made by direct purchasers to hospitals, and that's the other point, your Honor. Even if this was passed on in the form of higher premiums and even if this case had something to do with premiums, this is a direct purchaser case. This is not about the indirect effects of anything.

Let me move on, your Honor, unless you have any questions to the claims process.

So the main argument that the Varnum group is making about the claims process is that it's too burdensome for insurers and self-insureds. Your Honor, that is not correct, okay. Self-insured companies and insurance companies either themselves or through their administrator keep databases of insurance claims. Everyone -- every commercial insurer, self-insurer does that. So what's involved here is simply querying a database, downloading the relevant data and submitting it with their claim. That is not unusually burdensome. That kind of thing is done all the time and, in fact, here, your Honor, 616 insurers or self-insured entities to date have submitted claims. None of them found it too burdensome to do so.

Now, the other argument is, well, what about when Blue Cross is the administrator? When it's the one that administers a self-funded class member's health plan and, in that situation, it would normally be Blue Cross that would keep the database of the class member's insurance claims. They are arguing, the Varnum group, that in that situation, Blue Cross should have to automatically, I guess, file a claim for that class member to share in the settlement.

So there are a couple problems with that, your Honor. Number one, that would give preferential treatment to one segment of the class, the class that the -- the part of the class that happened to be customers of Blue Cross. And I can

imagine the objections the Court would have seen had Blue Cross customers in the class and only Blue Cross customers gotten their claims filed automatically and everyone else had to submit their own claims.

THE COURT: But you don't dispute that if they are the administrator that they would, upon request, have to supply such data? You just are asserting they shouldn't have to automatically do it?

MR. SMALL: Your Honor, so let me say what the obligation is and then what the practice has been. So it is correct that the settlement agreement places no obligation on Blue Cross to submit claims for a class member. And by the way, I should mention that that would be a significant commitment on Blue Cross' part. They were the dominant insurer in Michigan. They have plenty of self-funded customers, and if they had to do their database queries and productions for every one of them, that would be no minor undertaking. And our view, your Honor, as class counsel, was do we want to maximize the dollars that we can get from Blue Cross in our negotiation, or do we want to add burden to Blue Cross to participate in the claim process in this way, which would be expensive to it, and would therefore presumably mean less dollars they would be willing to pay the whole class, and we made the judgment that it was best to maximize the dollars.

But putting the obligation aside, the practice in

this case, and I'm sure Mr. Stenerson can speak to this more directly, my understanding, your Honor, is that every time a self-funded customer of Blue Cross has requested that Blue Cross provide the data that it needs to file a claim, Blue Cross has done so.

And let me quickly, your Honor, just address a few of the points that -- few of the other points that Mr. Walters made.

You know, the last time I looked, your Honor, appellate courts, especially before the district court has done so, does not make findings of fact. There are no findings of fact in the Sixth Circuit's opinion, and while Varnum apparently understands that opinion to be a strong endorsement of the liability case here, the Varnum group, after the record was unsealed, had access to the same record the Sixth Circuit did. Where were all the great documents in the objection that Varnum submitted if they existed and supported findings by the Sixth Circuit?

And they talk about, you know, the increases that the Sixth Circuit noted in reimbursement rates caused by the MFN provision for class members. Well, there's not evidence in this record in this case of increased reimbursement rate for all class members for this settlement class, your Honor. The problem that was -- the missing part of the analysis is the increased reimbursement rates were for the litigation class

that Dr. Leitzinger analyzed, and yes, that litigation class's reimbursement rates went up, but this settlement class includes many, millions of additional class members for which Dr. Leitzinger found no damages whatsoever.

Two last points, your Honor. Apparently the Varnum group believes that we should come into court as class counsel and lay bare how this case has huge weaknesses and just lay it out.

THE COURT: How it has what?

MR. SMALL: Huge weakness, your Honor, and lay out all the reasons we might lose this case. There are good reasons not to do that, and I'm not aware, your Honor, of that kind of representation being made by class counsel. Maybe Blue Cross will have more to say about that.

But we come at it primarily from a different angle, your Honor. We come at it primarily from the benefits that are generated by this settlement, which we believe would support virtually any case, even one that didn't have serious weaknesses. Although, we believe this one does have some real weaknesses. When we are able to recover 50 percent of the damages that have been measured in this case, that would support as reasonable a settlement in almost any case, your Honor, even a quite strong one. So we believe that there is no need here to delve deeply into the weaknesses when you have 50 percent of the damages recovered in the case.

So your Honor, I think I just want to make sure I cover one point, which we submitted a separate letter on. It came to our attention fairly recently that in one place on the settlement website, it gave the wrong date for the claims deadline in this case. It said November 8th, when the actual date is November 3rd, and the correct date appears in every other place, I think three other places in the website looked at. One place had the wrong date and we, therefore, sent a letter to the Court when we learned that and said that we would be requesting here, and we do now request, that the Court deem timely any claim that is either postmarked November 8th or submitted electronically by that date. It's only five days later than the claims date and it would avoid any possible prejudice to class members.

Unless your Honor has any questions, that's my presentation.

THE COURT: Okay. And does that mean Mr. Miller is going to argue as well?

MR. SMALL: Attorney fees, your Honor, and incentive.

THE COURT: Is anybody going to respond to Mr. Andrews' objections?

MR. SMALL: I mean we're happy to rest on our papers on that, your Honor, or if you have any specific questions, of course I'll be happy to try and answer them.

THE COURT: Okay. No, I don't have any specific

questions. I just didn't know whether or not you were going to argue anything in response to his objection?

MR. SMALL: Well, I'll say one thing, your Honor, on the standing argument. That was actually addressed by your Honor in the motion to dismiss in this case early on, and the Court did conclude as alleged that the Plaintiffs have standing, and in fact, your Honor, we are alleging under the antitrust laws that we overpaid for hospital services as a result of any competitive conduct. If that doesn't give standing under the antitrust laws, your Honor, I don't know what does.

THE COURT: Okay.

MR. SMALL: Thank you.

THE COURT: All right. Thank you. I actually think that now that I'm listening to it, you're going to argue everything but attorneys' fees?

MR. STENERSON: Yes, your Honor.

THE COURT: Why don't I hear that now.

MR. MILLER: Sure, your Honor. Understood.

MR. STENERSON: Thank you, your Honor. Todd Stenerson on behalf of Blue Cross Blue Shield of Michigan, and I'll try to go in somewhat of the same order as the objectors and address any other issues, and of course if the Court has questions, please let me know at any time.

With regard to Mr. Andrews --

THE COURT: Yeah, let's start with how much weight you think I ought to give to the Court of Appeals' decision, which the objector says directly points the Court to certain findings it ought to make or consider and perhaps adjust it to both sides that they might want to do something different than what they had done before in making a presentation to the Court.

MR. STENERSON: Yes, I will try to address all of that, your Honor. And first, I think Mr. Andrews' last comment was the case should be dismissed with prejudice. Blue Cross would object to that of course. But seriously, taken as a whole, Mr. Andrews I feel is making a lot of objections about all the ways the Plaintiffs could lose, and to that extent, I agree with that and I think the way to respond on behalf of Blue Cross is to inform this Court of the procedural posture of this case at the time of settlement. I think that's critically important.

Merits discovery had gone on for several years, as your Honor knows, as a combined discovery period with the Department of Justice lawyers representing Aetna in a competitor case, and the class action counsel essentially ganging up on Blue Cross three to one. There were hundreds of depositions taken, et cetera, and so that record in merits discovery was essentially complete at the time discovery -- I'm sorry, at the time of settlement, your Honor.

But at the time of settlement the, Plaintiffs had not filed a response to Blue Cross' *Daubert* motion on Dr. Leitzinger. There have been no decision on that motion for Dr. Leitzinger. The Plaintiffs had not filed a reply brief on class certification, and there was no decision by this Court on certification of the litigation class. There have been no summary judgment motions filed or ruled upon by Blue Cross. There are no merits expert reports or *Dauberts* filed or ruled upon by the Court. There have been no motions in limine filed or ruled upon by the Court. There have been no trial. There have been no post trial motions filed or ruled upon by the Court, and there have been no appeal of the merits filed or decided.

And my point, your Honor, is at every turn in that series, Plaintiffs risked a complete loss and they, on behalf of the class, made the decision they made, and from Blue Cross' perspective, the deal that they got was the best deal that was available to them.

And so that's how I would respond to Mr. Andrews, your Honor.

THE COURT: Okay. Thank you.

MR. STENERSON: As it relates to the Varnum objectors, I would -- while I hesitate to suggest what the Sixth Circuit was saying, I must sort of point out that the Sixth Circuit in Section IA of its opinion, begins the second

paragraph by stating, "Beginning no later than 2007, according to a complaint filed in federal court by the United States Department of Justice, Blue Cross used that power for worse," and then the Court goes on to talk about what was in the complaint of the Department of Justice.

And in Section 2B, the Sixth Circuit again begins that -- I'm sorry IB, your Honor -- Roman IB, again, begins that section with an introductory sentence, "The Department of Justice filed its complaint in 2010," and then goes on. In other words, my suggestion, your Honor, is the Sixth Circuit had at the time of the appeal essentially the DOJ complaint and, as you know, those were allegations that were never proven, were not subject to summary judgment, and ultimately were dismissed before they were proven.

So I think that's important to point out, and in that regard to the extent the Sixth Circuit had a record that it was relying upon, that's the same record that the Varnum objectors now have available to it. So if there was something to be found there, I would have expected the Varnum objectors to have pointed it out to us.

So then what do the Varnum objectors really say? I think what he says is, well, all I have are the two expert reports. I have Dr. Leitzinger for the class and I have Dr. Vellturo for the Aetna plaintiffs.

But before I get into that in detail, I want to point

out one mistaken belief that Varnum had, and they said that Blue Cross didn't submit any evidence of the risk of loss in this case. However, to the contrary, taking the direction of the Sixth Circuit, Blue Cross filed a brief, Docket Number 290, in support of preliminary approval on remand, and detailed in excruciating way evidence of the total record and what the record evidence was in the case.

And Mr. Walters referred to the Blue Cross brief in support of final approval, the brief -- Docket Number 352 -- where he says, all we do is say that the hospitals testified that there was no impact by the MFN, but what was overlooked, your Honor, is that that final approval brief actually incorporates by reference the original brief, 290, that does detail an exhibits -- with exhibits supported evidence from the record of that testimony. And your Honor, if you look at counsel's table, there is about almost a foot of documents. This is the evidence in the record supporting Blue Cross' brief about why there was a risk of litigation loss for the Plaintiffs, and that includes the testimony of the hospital executives, and that includes -- and this is at Docket Number 331, your Honor. It includes the unsealed record that your Honor ordered to happen on remand.

So we believe this Court painstakingly took the instructions of the Sixth Circuit to heart, unsealed the record, and that evidence, 1,200 pages of it roughly, was

available for review. And again, if your Honor looks at the brief at 331 and the supporting documents, you will see citations after citations after citations to evidence, documents, sworn testimony, all supporting the view that Plaintiffs' case was weak and that the MFNs, if anything, did not harm anyone.

In fact, on Page 14 of that original brief --

THE COURT: Is that 352?

MR. STENERSON: It's --

THE COURT: No, I mean 290.

MR. STENERSON: 290, your Honor.

THE COURT: Page what?

MR. STENERSON: Page 14.

THE COURT: Okay.

MR. STENERSON: You will see the citations on the first bullet, hospital executives who negotiated prices with health insurers unanimously, in over 65 hours of testimony, were unequivocal on this point. No differential MFN ever caused a hospital to raise or refuse to lower another health insurer's prices. And that's supported in footnote 49, your Honor, with the testimony of the hospital negotiators, who were the counter-parties to the MFN differentials, who were deposed for 65 hours. They were deposed by myself. They were deposed by Department of Justice lawyers, by Aetna lawyers, and class lawyers. If there was evidence to find, it would have been

found. That testimony, it was unsealed, is attached to Docket 331, but the Varnum objectors don't mention it.

So what about the Leitzinger report? Again, the Leitzinger report was subject to a *Daubert* motion. That *Daubert* motion was not responded to by the Plaintiffs because after receiving the motion, they settled the case. Now, I won't draw any inferences from that, other than to say that we thought that we had a strong motion, and the details of that motion are at Docket 140, your Honor, and we reference that in our brief in support of final approval, which is Docket Number 352 on Page 6, and we bullet the arguments that we made in the *Daubert* motion. Again, all of this is unsealed record that the Varnum Plaintiffs could have reviewed and commented but did not.

Then the other thing that the Varnum Plaintiffs do not mention is in the record was Blue Cross' expert, Dr. Sibley, and Dr. Sibley's report was attached to Defendant's Exhibit 25 of, again, our brief in support of approval at Docket 290 and Docket 331, virtually the entirety of that report was unsealed. It sets forth a counterview of the facts here and that was not mentioned by the Varnum objectors.

So what about Dr. Vellturo? So a few things, your Honor, about Dr. Vellturo. First, I'd like to address the sur reply filed by Varnum on the so-called $100 million. Blue Cross consented to Varnum filing that brief. We did not know

what was going to be in it before it was filed. After reviewing it, we agree that the $100 million exclusion that we referenced in our brief in support of final approval is a different portion of the record than what Varnum was referring to. And so we do want to correct the record in that regard and withdraw that statement, but we did not, your Honor, make that mistake intentionally; that was inadvertent. So we do want to --

THE COURT: You're withdrawing what statement?

MR. STENERSON: The statement that the $100 million payment to hospitals that Varnum references in its brief was previously excluded by this Court in a motion in limine.

THE COURT: Okay. All right.

MR. STENERSON: But what the Varnum objectors fail to appreciate, your Honor, is the testimony that would be referred to that was excluded. The reason we misinterpreted it is it was critical to the theory of the case, and that is this Court excluded testimony about prices impacting Aetna's rate. And in fact, if you look through the Vellturo report, there is scant evidence that there was any impact on Aetna because of the MFNs, much for the same reason I spoke to a minute ago.

But shifting gears slightly to the argument that Varnum does make now, that I understand what they're saying about the $100 million section in Dr. Vellturo's report. I would make three points, your Honor.

First, Dr. Vellturo is not an expert in this case and the Court did rule in the Aetna case that Dr. Vellturo's report itself was not evidence and was not admissible, and even in the Aetna case. So I would submit to you that report certainly is not evidence in the Shane case, the case that it was not even procured in.

Second, much like Dr. Leitzinger, in the Aetna case, Blue Cross filed a motion to exclude Dr. Vellturo's testimony at trial, not just his report, but his actual testimony, and that motion, your Honor, was pending at the time that Aetna settled its case. So the admissibility of any testimony of Dr. Vellturo -- of Dr. Vellturo at all was still at issue, and Blue Cross is confident that it would have succeeded in excluding some or all of that testimony, including the portions that Plaintiffs now try -- or that the Varnum objectors now are trying to rely upon.

And then third, your Honor, to the extent Varnum is complaining that Blue Cross paid hospitals more money in reimbursements, that is not an antitrust injury. Blue Cross pays hospitals lots of money every year to provide quality care to its insureds, and if in fact Blue Cross paid more money to hospitals, hospitals use that money to increase the quality of care it provided to Blue Cross and other patients, not the inverse. So it's simply not part of any antitrust injury or antitrust violation.

And then your Honor, lastly, I would like to address the claims issue if I could. First, I think I heard Varnum objectors' counsel admit that Blue Cross itself is under no obligation under the settlement agreement to submit claims, and he's exactly right. I would specifically direct you to the settlement agreement at Paragraphs 66, 51 and 72. This is of the amended settlement agreement, your Honor. Those three paragraphs of the settlement agreement, read individually and collectively, made clear that there is no obligation and that was a negotiated point.

And perhaps more importantly, in Paragraph 73 of the amended settlement agreement, if this Court were to find and provide for a material change in Blue Cross' obligations under the settlement agreement, that would be grounds for Blue Cross to set aside the deal, for many of the reasons Mr. Small described. The idea that Blue Cross would have to prepopulate these claims is excruciatingly burdensome and was something that was not negotiated for and not promised.

That said, your Honor the claims process in this case was not designed or pushed by Blue Cross. It was a function of the theory of Plaintiffs' case. In other words, the fact that there are three types of claims being made to MFN hospitals where there was, in effect, MFN hospitals where Plaintiffs did not have an effect and then all other hospitals, is a function of Plaintiffs' theory and the settlement, not a function of how

Blue Cross holds its data. And we, in fact, do not hold our data in that fashion. So this would be a customized report for every class member.

That said, your Honor, I can tell you, as an officer of the Court, Blue Cross has responded to every request that I'm aware of from any class member that wanted their data, Blue Cross has provided it to them at no cost, despite that lack of obligation. So I am not aware of any class member who has sought information from Blue Cross and it was not provided to them.

And I guess the last point, your Honor, on the claims process, I mean I think the Varnum objectors suggest there are 84,000 claims made. That actually suggests to me the exact opposite. If 84,000 class members found a way to file a claim, this process is not burdensome, and the proper inference to draw from that, your Honor, is that it is a fair process, and it should be approved.

Unless the Court has any further questions, I have nothing further.

THE COURT: I do not have any at this time, thank you.

MR. STENERSON: Thank you.

THE COURT: Let's take five minutes, okay. We'll take a break for five minutes.

(Recess taken 3:42 p.m. until 3:54 p.m.)

THE COURT: I'm sorry I took a little longer, but I'm ready to proceed. Mr. Miller, are you going next?

MR. MILLER: Yes, your Honor.

May it please the Court. This is our motion for attorneys' fees, reimbursement of expenses and incentive fee awards for the named Plaintiffs. All of these are requests of the Court, none of them are tied to the settlement and all of them are at your Honor's discretion.

Your Honor four years ago approved our request for fees, reimbursement of expenses, and incentive fee awards in full. In the last four years, nothing has happened that should change your mind. If anything, the equities are even more in favor of the judgment your Honor exercised four years ago. Class counsel has performed a lot of work over the last four years. We're not seeking one additional nickel of compensation for that work. We have waited four more years for payment. We have now gone seven years without any compensation for this case. We have expended more than $3.5 million out of our own pockets, and we have lost the use of those monies for four more years.

The Varnum objectors' arguments against our fees are misplaced. They primarily rely on dicta from the Sixth Circuit opinion about rates, but that dicta is irrelevant to our case. The Sixth Circuit never got to the fees issue. It was not even squarely before the Court, because the Court rendered its

decision based upon ceiling.

We do not seek fees based upon a statutory fee shift or an hourly rate. Our fees are based upon a percentage of the common fund, which has been explicitly authorized by the Sixth Circuit in the *Prudential* opinion and has been the trend in district courts in the Eastern District of Michigan and throughout the Sixth Circuit for at least 20 years. Our request of 28.78 percent is below the customary award of 30 to 33.3 percent in this district.

Clear and simple, we are not seeking a fee based upon hourly rates or any statute. The only reason we provided the Court with our hourly rates is for a high level cross check so that the fee percentage is shown as reasonable. Just yesterday, Judge Battani, in the *Auto Parts* antitrust MDL, noted that defense attorneys in antitrust class actions frequently charge more than $1,000 per hour with no contingent fee risk and no risk of delay. Our request, your Honor, is for an effective hourly rate of $266 per hour, well below -- far below the standard for cases of this type.

It is ironic, your Honor, that the Varnum firm requests an attorney fee award of $427 per hour, but the Varnum firm recovered zero for the class, yet the Varnum firm seeks a much higher effective hourly rate for recovering zero, for causing class members to wait four more years for their compensation, and if they are successful in blowing this

settlement, which I don't think they will be, I certainly hope not in this court and I don't believe that it'll be successful a second round in the Sixth Circuit. They put in jeopardy $30 million for the class and would likely create an enormous windfall for Blue Cross.

Our rates, which are only a cross check, are supported by 19 declarations with summaries of the work performed. In 30 years of practicing plaintiff class action work, I have never seen time records produced to support a cross check, and that's the whole point of the percentage of the benefit method so that we don't clog the courts with reames of paper, with thousands and thousands of individual time entries.

Now, as it relates to Varnum's motion for fees, it should be denied. The law is clear and overwhelming, that these four objectors are the exception and not the rule. There are two ways to get paid, your Honor. One is -- really, three ways. Is there a contract that says you have a right to get paid? Well, we don't have that here. A statute? No statute. The third way is the *Boeing Vandemoer* case that says where you create a common fund you have an equitable lien on the fund. That's how we get paid in this case.

But they have not created any fund, and they have done next to nothing with the unsealed record. They have built no case. They have hired no experts. They have offered no

affidavits. Had they done real work and persuaded Blue Cross Blue Shield to increase the amount of settlement, I would join in their fee request, your Honor. I would applaud them. In fact, in the *Mercury Interactive* case, which I'll talk a little bit about later, an objector against us, I supported their fee application in the Ninth Circuit, because I thought they did a great job and what the objectors did in that case was change the law to require -- in fact, I'll deal with it now.

What *Mercury Interactive* did, your Honor, was change the law in 2010 so that class action practitioners must advise the class of their motion. The motion for fees must be filed before the date to object so that class members can weigh in on the class counsel's request for fees. Well, in this case, they kept that secret from the class. They never told the class that they seek fees, and I think there's some real irony here --

THE COURT: That the Varnum groups -- the groups represented by Varnum, you're claiming they didn't let their fee motion be known before the period of time that you had to?

MR. MILLER: Correct.

THE COURT: Okay.

MR. MILLER: So the class is in the dark. The class has no idea that Varnum wants to be paid from the pot that they did not contribute to and that the lawyers who caused the class members to wait for four more years, that they want to charge

the class for that delay. That has been kept secret from the class.

And in their papers -- and I think this is a bit ironic too, your Honor, they tout that it was, quote, error to have the record sealed. I disagree. That was the practice of every district court in the Eastern District of Michigan for 30 years and elsewhere, to have confidentiality, sealed records. This case changed the law, and it's changed the practice throughout the Eastern District of Michigan, and I respect the Sixth Circuit's ruling, but let's be clear, that's a change in the law. The practice was exactly the way it was done in this court for decades.

But it's ironic for them, your Honor, to tout some major victory to unseal these records when they have effectively sealed their own request for attorneys' fees from the class. And the authorities they cite are even weaker. They only cite two cases. We cite many cases as to why the objectors should not get any fees. They cite *Leonardo versus Travelers* from the Northern District of Ohio. Well, that case harms them because the Court held in that case that even where the objector arguably increased the settlement fund by $2 million, the Court declined in its discretion to award the objector any fees, and that's a case they rely on.

They don't even allege in this case that they've created one penny of value for the class.

The other case they rely on out of the Eastern District of Kentucky, the *Howes V Atkins* case, is a 31-year-old outlier where the Court awarded class counsel 40 percent of the common fund, even with the objection, and I don't think Varnum is saying that we should have a 40-percent award, and to be sure, we are of course not saying that we should have a 40-percent award. If they had done something that helped the class instead of harm the class, which is what they've done, they've harmed the class, we would be in support of a fee award for the Varnum firm.

As it relates to the incentive fee awards, like our fee requests, they are at your discretion, and the Sixth Circuit did suggest that there should be time record or something of the like to support incentive fee awards. Well, it's impossible to do that now because they were not done contemporaneously, and we will never make something out of whole cloth. That's something that cannot be done. But there are plenty of cases that have awarded incentive fees much higher than we are seeking for these good people, your Honor, who took time out of their lives, who took time off work, who produced thousands of pages of documents, many of them sat for depositions, and I think in the exercise of your sound discretion, you should do what you did last time and grant the relief that we request. But again, it's not tethered to the settlement. So whatever happens on that in this Court or in

the Sixth Circuit would not link to the settlement. It would not impact the settlement.

As to the expenses. It's really disappointing to hear criticism that we went out of pocket $3.5 million. Your Honor, those checks were very painful to write. We wrote them at our risk because of the case that we believed in, and if we didn't do it, the class would have gotten nothing. We had every incentive to reduce the expenses, but we don't cut corners. If you're going to be an antitrust class action lawyer, you have to hire experts to have a chance to win, and you have to spend the money. We wish it was a lot less, but without those expenditures, there would not be any recovery in this case.

I'd like to say just a little bit about Mr. Andrews' objection, and I appreciate that in court today he was a gentleman, and I really do appreciate that, your Honor, because he has put us through a lot over many years. This process started with Mr. Andrews, before he filed any objection, demanding that we cut our fees by about $900,000 and cut him a check for something over $100,000. It was in the six figures. We refused to pay a ransom, and then he went on a multiyear campaign, continuing through 2018, to threaten us with bar grievances, with letters to federal judges, to get publicity against us over and over again, and that's part of the tough work that we've done in this case, to stand up to that abuse

and to fight for this settlement and not do the easy thing. It would have been a lot less expensive for us to have cut him that check, but it would have been the wrong thing to do, and that's not the kind of lawyers that we are.

Which gets to, your Honor, what I really think is the key to this motion, and the key to this motion is the judgment of experienced class counsel. You have 19 experienced class action firms that have litigated hundreds of complex class actions and antitrust class actions that support this settlement. This group of lawyers, Mr. Small, Cohn Milstein is one of the best plaintiff class action firms in the United States. They have gotten many settlements, many in the hundreds of millions of dollars. I was fortunate to have one against AIG, where the Government decided not to prosecute, just like here, the DOJ decided to stop. We kept going. In AIG we got a $970 million settlement. We would not have accepted a $30 million settlement at AIG, because it was our judgment that the settlement value far exceeded $30 million. So we fought for years until we got the settlement number that we thought was fair and equitable.

Likewise, here, your Honor, if these 19 firms, myself included, believe this case had more settlement value than $30 million, of course we would have continued to litigate it, and the law is very clear that there should be deference to non-conflicted, experienced class counsel where the settlement

is at arm's length, which is undisputed in this case.

Mr. Walters is a very good commercial litigator, and I respect him, your Honor, but he doesn't have antitrust experience. He doesn't have class action experience. They've had years to try to build a case, four years to try to build a case as to why this settlement is inadequate. They have not one expert, not one affidavit from an experienced antitrust or class action attorney to suggest that this settlement is unreasonable or inadequate.

But the pursuit of this objection has caused harm to the class. It has achieved no benefit. I'm proud of the hard work that we've done. It hasn't been fun with the kind of abuse we've suffered from Mr. Andrews, but we will never give in to that. I respect the professionalism of the Blue Cross lawyers. And I believe that Varnum has litigated with us in a civil and professional way, but they have come up with nothing that should disturb the judgment of 19 class action firms who have put their heart and soul into this case, your Honor. Thank you.

THE COURT: Okay. Thank you, Mr. Miller.

Mr. Stenerson, will you be responding to this?

MR. STENERSON: Just a very few comments, your Honor.

THE COURT: You may. Mr. Miller took the opportunity to have his response I think to the requests of the parties represented by Varnum, wouldn't you agree that you did kind of

respond to --

MR. MILLER: I sure did, your Honor.

THE COURT: -- yet to be made.

MR. WALTERS: And I hope I can be heard on that.

THE COURT: I am, but I just -- I want to make sure where we are so that I don't duplicate it. So if you were going to respond to them, you should make that part of the points you'll make now too.

MR. STENERSON: Yes, your Honor. Todd Stenerson on behalf of Blue Cross Blue Shield of Michigan, and really, your Honor, I just want to make three points. The first is I want to echo Mr. Miller, that we believe the decision on the attorneys' fees of the class, attorney fees of Varnum, and the incentive award fall squarely within this Court's discretion and that's solely within your jurisdiction to decide and we know your Honor will exercise that discretion wisely.

I do also want to echo point number two that Mr. Miller made, and that those decisions by this Court, whether to accept or reject any or all of the fee applications incentive award or making any modifications to any of those do not affect the finality of the settlement. And just so your Honor knows that's specifically Paragraph 78 of the amended settlement agreement that makes clear that the exercise of this Court's discretion in this area will not impact the finality of the settlement agreement and it is separate.

Then my last point, your Honor, is just that, as this Court knows, I can say as an officer of the Court, this case was vigorously litigated. It was expensive. It was excruciatingly time consuming, and all the lawyers involved in the merits performed at the highest levels of the profession and worked hard. Thank you, your Honor.

THE COURT: All right. Thank you. Okay. I think you get to argue your motion next. You didn't respond to -- well, maybe you sort of responded to it?

You can just stand at this other podium for just a second -- well if you want to make any response to Varnum's request?

MR. STENERSON: Blue Cross takes no position on Varnum's request.

THE COURT: Okay. All right. Thank you. Now you can go to the main podium.

MR. WALTERS: First, thanks for that, not making me stand there too long. I appreciate that.

Your Honor, I already spoke on the objections as to any concerns that we have with the incentive fees and the motion for attorneys' fees by class counsel. So I'm not going to readdress those issues. I'm only going to limit my comments to my firm's motion for attorney fees and costs in a total of $165,128.43. While on one hand, that's real money to us, I certainly hope the Court will grant this motion. It's also a

relatively modest amount in the scope of what we're talking about in this case.

Mr. Miller, at the conclusion of his argument, made the point that if Varnum had done something that helped the class, he would be first in line to support our fee petition. But in his mind, we harmed the class because by the fact we made an objection to the process below, which was agreed to by the Sixth Circuit, we have delayed the process, which actually somehow has harmed the class, and that's just not a fair reading or assessment as to what's happened here, your Honor.

The Sixth Circuit has been very clear that this Court has discretion to award fees and costs to counsel for objectors if the work of counsel produced a beneficial result for the class. That's the language the Sixth Circuit used in the older case 294 Federal Appendix 210 Sixth Circuit in 2008.

The Sixth Circuit has not defined further what constitutes a beneficial result to the class. It's not kind of drilled down to say these are an exclusive list of the types of things that are benefits to the class or not benefits to the class. What's important, your Honor, is that no court that I am aware of in our research has ever said that the only kind of benefit to the class that can be a basis for a fee award is a financial benefit or as a result of the objection the amount paid to the class increased. I'm aware of no cases from any jurisdiction that have held that.

Of course there are lots of cases that talk about factual circumstances where the benefit that the objector gained for the class was some sort of change in the settlement amount.

Here, we had no role in the settlement process. We -- again, we attempted to intervene as a party in the case where we might be able to have some sort of role in that. The Court chose to deny our motion to intervene and Plaintiffs' counsel made the choice to charge forward with the same settlement that was proposed previously in terms of the dollar amount that Blue Cross would pay in this case. So this was not a circumstances where the objectors even had any opportunity to potentially participate in a renewed settlement process. We certainly would have loved to, but that was not invited by the parties.

We've cited cases that have held that a beneficial result to the class can occur in circumstances where there are not financial benefits to the class, where there were some other sort of benefit to the class as a result of the objection. And we cited the *Howes* case from the Eastern District of Kentucky as one example to that, and while that might be described as an outlier by Mr. Miller, that is in fact a case arising from the district court in this jurisdiction. It was not overturned on appeal. It remains good law. It's not binding of course; it's a fellow district court, but it's

persuasive authority this court can look to within this circuit.

I think the Sixth Circuit in its opinion really answered the question already as to whether or not the objection that was filed by my clients provided a benefit to the class. And it did so at Pages 308 and 309 of its opinion, in which the Sixth Circuit made very clear that the class members were harmed by not being able to fully participate in the Rule 23 process because they did not have access to the record, because of the Court's decision based on the stipulated motions of the parties to seal such a substantial part of the record.

I'm going to read just a few key portions of the Sixth Circuit's opinion in this regard --

THE COURT: You may, but I probably know them by heart.

MR. WALTERS: And I don't do this for any reason other than to make sure that --

THE COURT: Okay. Maybe not everybody knows them by heart.

MR. WALTERS: Certainly. The Court found the following: "Class members cannot participate meaningfully in the process contemplated by Federal Rule of Civil Procedure 23(e) unless they can review the basis of the proposed settlement and the other documents in the court record. All of

the named parties to this case signed on to the proposed settlement only after reviewing the expert report and other sealed documents in the record. The unnamed class members are entitled to do the same, subject to the rights of the parties and third parties to make the showings necessary to seal. The Rule 23 objection process seriously malfunctioned in this case and that is reason enough to vacate the district court's approval of the settlement."

The Court elsewhere, the prior page of the opinion, noted that this issue of the sealing of the records, the Court said the following: "And one cannot say in any realistic sense that this error was harmless. What those employers and other class members cannot know, however, whether it does or does not make sense for them to accept about 12 cents on the dollar of their damages, as estimated in Leitzinger's report, or less than 4 cents on the dollar of the award they might obtain at trial."

Again, that reference to treble damages in terms of what might be obtained at trial.

"To make that judgment, the class members must be able to read the report, for which under the settlement agreement, the class members would be required to pay more than $2 million, along with the scores of other documents they could not read in the court record below. Only then can they assess for themselves the likelihood of success on their claims."

There's simply no question, your Honor, that our objection, my client's objection provided a substantial benefit to the class by allowing them to meaningfully participate in the Rule 23 process. There's no question, based on the Sixth Circuit's analysis, that that was correcting a significant harm to the class as a result of the objection.

And we were very clear, your Honor, in terms of the scope of our motion for attorneys' fees, we are only requesting attorneys' fees and costs up to the point where this case came back on remand. We are not requesting at this point costs and attorneys' fees for being here today or for our other objection to the second settlement. We are only requesting those attorneys' fees and costs related to our first objection, which was upheld on appeal with regards to the issues that the Court is extremely well familiar with.

So we cut off our request and separated what we're doing today, because the Court might find that what we're doing today is not beneficial to the class. If the Court were to affirm the award as-is, or the proposed settlement as-is, the Court might claim, well, today, Mr. Walters, you didn't add any value to the class, any benefit to the class and therefore I'm not giving you your attorneys' fees for what you've done today or what you did in filing the objection here this past September, two months ago.

Of course we think we are adding benefit, but that's

to be determined. Our motion is about what we did back the first time around and our costs and fees incurred in doing so, which are very modest in the scope of what's been involved in this case.

There are no objections here from anyone from either the Plaintiffs or Blue Cross as to the Lodestar method that we presented for calculating those fees. We have not attempted to present our attorneys' fees request as on a percentage of the common fund basis. I agree with Mr. Miller that because we weren't involved in negotiating the amount of that common fund, that probably would not be the appropriate way to look at the objectors' fees. The objectors' fees are more properly looked at in a traditional Lodestar method. We presented that methodology.

We presented the number of hours worked. We presented the average -- or our hourly rates. We presented the average hourly rates within the state of Michigan with the evidence that was presented in the Court. We actually even turned over all the contemporaneous time records related to our work so that anybody who is questioning these could look in detail at those and say, oh, wait a minute, what were you doing on Thursday, March 2nd of 2015? I don't think you should get paid for this. We've had no indication that -- this has been on file since September. We've had Plaintiffs' counsel, class counsel able to look at that. Blue Cross has been able to look

at that. Anybody looking at the court records have been able to look at that. We've not had a single indication of a single entry in there that is somehow improper.

We did not file this in September of this year, our motion for attorneys' fees in September of this year in some attempt to hide or obfuscate our process, not at all. The timing of that is very much related to the timing in which we're involved with our clients and the objection process of saying, okay, what's going to happen here? Are we going to continue to object to this renewed settlement, based on what we've now seen in the record? Or are we satisfied that now that we've had the opportunity to review the record, that the settlement that's being proposed is in fact fair, reasonable and appropriate?

We didn't think it was appropriate to come running to court before we had made that assessment. We did make that assessment. We spoke with our clients about that assessment, and we made the determination that we would in fact be filing an objection to the renewed settlement the second time around.

THE COURT: Okay. But let me just flesh that out a little bit. So I think what you said was none of -- none of your fees relate to this round of objections, is that what you said?

MR. WALTERS: That's true, yes.

THE COURT: So they were all fess that you knew you

were going to ask for anyway despite whether or not you filed an objection?

MR. WALTERS: I don't know about that, your Honor --

THE COURT: But if they were, they would have been fees that would not have been related to this so that you could have filed that earlier so that everyone so could have seen them the --

MR. WALTERS: We could have filed our motion for attorneys' fees earlier. We were not required --

THE COURT: No, you weren't, but you could have.

MR. WALTERS: I agree with that, your Honor. We could have filed that motion earlier in the process. I would submit that there's a logical ex -- first of all, I submit there's a logical explanation for why we didn't. That had nothing to do with an attempt to hide things from any party --

THE COURT: I didn't suggest you were hiding.

MR. WALTERS: I know.

THE COURT: But I can understand the argument that is made by Mr. Miller in a different way as a result of how -- what the attorneys' fees that you're speaking to. I just wanted to be sure.

MR. WALTERS: Fair enough, your Honor. I appreciate that clarification.

And the court rules on this are very clear, that the motion for attorneys' fees is proper under the Federal Rules of

Civil Procedure even 14 days after the final judgment enters, unless the Court has entered an order saying you have to file your motion sooner than that, and that is what the Court did here. The Court entered an order that said that class counsel needs to file its motion for attorneys' fees sooner, earlier in the process so that the class members would have the opportunity to look at that and be heard beforehand. The Court did not -- the Court specifically in its order directed that to class counsel. The Court did not enter an order that said any request for attorneys' fees --

THE COURT: No, I didn't suggest that. I did do that.

MR. WALTERS: Sure. And again, I'm just clarifying the scope of what the order says. So under the rules, there's no question that we were within our rights to do that, and there's no prejudice to the class here either, not only because nobody has made any objections to what's been presented, but because, your Honor, our expectation is that any fee award to my firm would come not from the net settlement amount but rather would come from any amount awarded to class counsel as attorneys' fees, and the reason why is that our objection, in my humble opinion, our objection was making up for a gap or deficiency in class counsels' efforts the first time around in the settlement, that in our opinion, class counsel, in representing the interests of the class, should have made sure

that the key documents in the court record that were the basis for the settlement were available for inspection and consideration by the upwards of seven million potential class members impacted by the settlement.

So we're not asking that any money be taken away from the class in terms of the settlement amount. We're asking our attorneys' fees be awarded out of -- essentially as a deduction to any amount that the Court would choose to award class counsel in this case.

THE COURT: Okay. Thank you.

MR. WALTERS: Unless the Court has any other questions.

THE COURT: I don't.

MR. WALTERS: Those were my points.

THE COURT: Thank you. I know Mr. Miller you want to stand up, but Mr. Andrews has had his hand up for a really long time, and so do you want to respond is to something? Okay. You may.

MR. ANDREWS: I apologize for being premature.

THE COURT: That's okay. You're going to address your comments to the Court of course?

MR. ANDREWS: Of course, your Honor. This is going to be short and sweet. This is two, three minutes tops.

Okay. Let me touch on --

THE COURT: Let me just say that contrary to what you

all may think, I am listening to your arguments and taking notes and so you don't have to repeat your prior argument as I am paying attention to them.

MR. ANDREWS: Agreed.

THE COURT: Okay. That goes for everybody.

MR. ANDREWS: Let me address the attorney fee issue for a second related to Varnum group's request. Number one, I don't think they should be entitled to any attorney fee reimbursement from the class fund. They should certainly be entitled to a fee from the attorney fees, if any of the attorneys behind me get any fees.

The reason they're entitled to the fees is, number one, when this got sent up to the appeals court, there were 41,000 claims filed; today there's 84,000. So double, 41,000 more claims were filed, which was a result of the Varnum group and myself appealing the issues. So I think they're entitled to a fee based on those doubling of claims that those people would not have gotten anything. At this point, we don't even know what they're going to get. So that's as far as my two cents as far as what they're entitled to.

Let's see here. Relating to Mr. Miller's presentation. He left out something by direct omission. Let me step back. They should not have raised this issue today, but I'll respond to it. I filed a I guess what you would call a predraft objection that I sent to Mr. Miller. They then

suggested we get together on a conference call and everything was supposed to be confidential. As it turns out, that was a double cross.

If Mr. Miller had not double crossed me back four-and-a-half years ago, along with the other gentlemen sitting behind me, the only issue in front of the appeals court would have been this sealed record issue. I brought up five issues. All five were brought up and raised by the Sixth Circuit for your Honor to relook at.

So this four-year delay that I'm being blamed for, along with the Varnum group, is the sole result of class counsel double crossing me and also putting together a settlement that's still not valid today. Eight years later, they still can't put together a valid settlement release. There's 22 major errors I pointed out in that release. I'm a class member. I am not -- I am not agreeing to be locked into that agreement at all.

When we had this conference call as a result of my pre-objection draft, class counsel, Mr. Miller in particular, offered to drop their attorney fee from $10 million at that time to $7.5 million if I would endorse the settlement. I told him I'd be happy to endorse the settlement, but $900,000 giving up in attorneys' fees seemed to be more fair than the difference between $7.5 and $10 million.

So they're not as self-righteous as they try and

claim in front of the Court that they -- let me give you another example. Mr. Miller did --

THE COURT: This is for the purpose of saying that they should not get their amount of attorneys' fees or just responding to his allegations against you?

MR. ANDREWS: Both. As far as if you were to award attorney fees to them, which I don't think we should even -- we're not even at that point, instead of giving them their $8.8 million, we start at $7.5 million, which is what they agreed to give up for me to endorse it four-and-a-half years ago. You then subtract the $1.3 million that I told them four-and-a-half years ago they were going to be paying for the second notice, which they did. They come back and say, well, we would have done that anyhow. No, they wouldn't have. That's being facetious.

They did it because they know I would object today, but the client shouldn't have to pay for their mistakes, and then subtract out $700,000 that the firm from the city of Pontiac is requesting. They did not help get that $30 million. They had nothing do with it. This Court dismissed that case back in 2012. They're not entitled to a penny. That brings it down to $5.5 million.

I can also give the Court a cross check on the $5.5 million. Based on all the errors that class counsel has caused in this litigation -- and they're extensively listed in

my objection, the 84-page objection and the 500 pages of exhibits.

I'm going to bypass that.

Let me talk about one other issue here. The last issue is I'm going back to the named Plaintiffs. I don't believe the named Plaintiffs adequately represented the class. According to Blue Cross' Document 328, Carpenter's, which is one of the name Plaintiffs, have plead facts in the current complaint that are not true, making them a defective named Plaintiff. They lack injuries. They lack standing.

The other Plaintiffs apparently want out of the case but apparently class counsel won't let them, but they're going to keep them in the case to give them $165,000 so they can get the $12.5 million in fees and expenses they want. Mr. Miller touched on his AIG settlement for $975 million. Mr. Christopherson [sic.] here has got a pending case of $1.1 billion. Cohn Milstein, hundreds of millions dollars here. These people -- this isn't about money, this is about them -- about me bruising their egos. No one has ever spoken to them and written to them like I have, and it's all true. I would never say one word that's negative about anybody. I'm -- I call it as I see it.

I believe the named Plaintiffs are invalid. They're defective, and they do not have standing. They could not have represented the class over the past eight years. They're being

used as puppets by the named Plaintiffs so class counsel can bill out large numbers of attorneys' fees and then also that allows the Defense counsel to bill out these too.

If you want to do a double check, and I think you can get the answer today before we leave here, is class counsels' claim, without a shred of evidence, that they put in 34,000 hours worth of work. If you want to see if that's too high, you should ask Blue Cross' outside counsel how many hours they've billed. That's not confidential. It's not -- not the amount, the number of hours they've billed, and then compare the two and see if that's within reason.

All of the named Plaintiffs appear to claim damages at hospitals that do not have either -- let me rephrase that. Some of the named Plaintiffs appear to claim damages on a hospital that does not have an MFN agreement. Others claim damages for treatment at hospitals that did have a -- that didn't have an MFN agreement clause, but the damages can't be proven, even with a clause in effect at dozens of hospitals.

Mr. Small mentioned two or three times that these MFN agreements were only in effect for three and four years at many hospitals and not eight years. Well, that claim backs up what I'm about to say. So I thank him for that information. In October 15th, 2018, *Asacol Antitrust Litigation*, the First Circuit clarified its position on a predominance issue, which is also applicable in this case. Can a district court judge

certify class actions in which not every class member suffered injury? No. The First Circuit panel sided with the Third and Fifth and the District of Columbia Circuits to hold that the predominance requirement in the Federal Rules of Civil Procedure for class actions precludes class certification if more than a minimum number of prospective class members haven't been injured. In this case, large numbers, 22 percent minimum of the class in categories two and three are uninjured, because class members can't prove damages at a large percentage of those hospitals even though they had a MFN agreement in effect.

THE COURT: Okay. This is far beyond the amount of the time you told me you were going to take. Tell me how much longer are you going to be.

MR. ANDREWS: Thirty seconds.

THE COURT: Okay.

MR. ANDREWS: Under Rule 23(a)(4) the representative parties, including class counsel named Plaintiffs have to valiantly adequately protect the interests of the class. They did not do that in this litigation. I've reviewed 250 class action settlements over the past eight years. This is the second worst one I've ever seen. They've done nothing to change the issue, except for unsealing the documents. All the other issues I've raised are still there and now the new standing issue I'm raising. This is not going to get by the Sixth Circuit, absolutely won't do it. I would like to win at

the Sixth Circuit in front of them doing oral argument. I don't need the Varnum group or Mr. Walters to do that, with all respect to him. I can do it on my own because this is so bad. I thank you very much for your time and patience.

THE COURT: Okay. Thank you. Mr. Miller, if any of your argument is going to be something that you already argued, I don't think it's necessary, and if any of your argument is going to be to respond to Mr. Andrews response to your allegations relative to him, I don't think it advances anybody's argument.

MR. MILLER: I won't do that, your Honor, and I will be succinct and I'll try very hard not to repeat anything I already said.

THE COURT: So how long are you going to take?

MR. MILLER: I'm hoping about three minutes; no more than five.

THE COURT: All right.

MR. MILLER: Mr. Walters acknowledges that there's no economic benefit, but he claims that class members benefited because they had the opportunity to participate because of unsealing. He has no proof of that, and the objective evidence is the opposite. We have no new objectors and we have one less objector. So there's no evidence of any benefit.

Second, he makes an argument that I believe is very unfair to the Court and to us, that they were deprived of

information they needed to evaluate the settlement and work up an objection because their motion to intervene was denied. After the Sixth Circuit's ruling, they never once asked the Court for any discovery. They never once asked us for any more information and, your Honor, we met with them twice. Prior to the final approval hearing, class counsel met with Mr. Rynders. We said we're here to work with you. We think this is an excellent settlement. Let us know if you need anything more to evaluate.

After the final approval hearing, we met again with him, me personally. I told him I thought it was a good settlement, that if he could get more money out of Blue Cross Blue Shield that would be wonderful, but I didn't believe that he could and we hope that he doesn't object again, but we want dialogue to be open. We got nothing. They have no answer to my argument that the only recent case they relied on, the *Leonardo* case, denied the request for objector fees even where the objector arguably increased the value of the settlement.

Now, as it relates to their obligation to inform the class. They are functionally acting as class counsel because the only way they are entitled to fees is if they created a class benefit. Therefore, they are bound by the practice, since the Ninth Circuit's opinion in *Mercury Interactive*, to let the class weigh in on a fee request that ostensibly benefits the class.

And this is my last point, your Honor. They're good lawyers. I like the Varnum lawyers, I really do, but they're noting do the right thing here. This is not their area of expertise and they are unwittingly causing harm.

THE COURT: Okay. So that argument you made earlier.

MR. MILLER: And I'm done. I did pretty good not duplicating.

THE COURT: You did.

MR. MILLER: I tried.

THE COURT: Does Blue Cross want to add anything?

MR. STENERSON: No, your Honor.

THE COURT: Okay. Then I think I've heard everything I need to hear, right -- and you have something more?

MR. WALTERS: No, I --

THE COURT: If you stated it prior to this time, I am listening and you do see that Mr. Miller knew that I was getting ready to cut him off.

MR. WALTERS: I do, your Honor. I think it's my instinct to stand up because it was our motion for attorneys' fees. So I always feel like as our motion I should be heard last, but I'm going to take the strong vibes I'm getting from the Court that, your Honor, you're on top of it.

THE COURT: If you're going to raise something new, I'm happy to hear it, but if you're just going to reiterate to Mr. Miller's argument because he took the liberty, which you

did not object to, of bringing up his response to your argument before you had made it, which puts us kind of out of order, I'm happy to hear it, but if it's not new.

MR. WALTERS: I think it ends up getting into side track issues. I could have things that I could talk about what -- you know Mr. Miller referenced a couple of different discussions that we had over the course of the last few years. I don't think those are things that are going to be driving the Court's decision on attorneys' fees.

THE COURT: No, nor are there going to be any of the compromises that you all attempted to make, they're not the issue for the Court to decide.

MR. WALTERS: So with that, I will sit down, your Honor.

THE COURT: Okay. Anything else we need to hear today? Okay. Then I thank you very much for your arguments and I'm required to give you a written order and I'll do that, all right.

MR. MILLER: Thank you, your Honor.

MR. STENERSON: Thank you, Your Honor. Thank you very much have a good evening.

(Proceedings concluded 4:44 p.m.)

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C E R T I F I C A T I O N

I, Andrea E. Wabeke, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth. I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/Andrea E. Wabeke — October 10, 2019

Official Court Reporter
RMR, CRR, CSR — Date

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